

HART INTERCIVIC E00718900JB

**Draft Minutes**

Special Meeting

August 5, 2009

The Board of Commissioners held a Special Meeting on Wednesday, August 5, 2009, in Commissioners Meeting Room at the Courthouse. Board members present were Chairman Frank Holman, Commissioner Tim Glenn and Commissioner Dennis Giese. Others present were County Attorney Jenny Davis, County Development Services Director Don Reimer, County Land Use Counsel Barbara Green, County Clerk Joyce Reno and Deputy County Clerk Merrillou Cicerelli.

Following the Pledge of Allegiance, Chairman Holman called the meeting to order at 9:02 a.m.

Chairman Holman asked for verification from Deputy Clerk Cicerelli that the agendas were distributed appropriately. Deputy Clerk Cicerelli stated that the agendas had been distributed appropriately.

Chairman Holman stated that this Special Meeting was being held as a continuation of a public hearing to consider a request from Nestle Waters North America, Inc. – Special Land Use Permit and 1041 Permit. The request was The Development Of Spring Water Source, Associated Transmission pipeline and loading facility. Location: 12916 and 12974 Highway 24/285, Johnson Village, 22565 and TBD County Road 300, Nathrop. Pipeline will be located on the subject properties; and within the rights-of-way for County Road 300, County Road 301 and County Road 310, and within easements proposed for publicly and privately owned lands between the project properties.

The Board was presented a draft of the Condition for Nestles Waters North America, Inc. The draft was as follows:

**General Permit Conditions**

1. Scope of Permit and Permit Amendment. This Permit is limited to the Project as described in the Permit Application by Nestle Waters North America (Permittee), as amended during the public hearing process orally or in writing, and as approved hereunder (the "Permit"). The Permit conditions shall include all agreements and representations of Permittee made during the public hearing process. The Permittee shall notify the County of any proposed change to the Project features or operation, and the County shall determine whether an amendment to this Permit would be required to ensure that the changes will not violate any standards in the County 1041 Regulations or conditions of this Permit. If the County determines that any material representation made by the Permittee in the Permit Application or during the public hearing process is false or deliberately misleading, the County may pursue an Enforcement Action for violation of this Permit.
2. Dispute Resolution. If a dispute arises pertaining to matters covered by this Permit, other than an alleged violation of this Permit, the Permittee and the County Attorney shall first meet to attempt to resolve the dispute. If the dispute cannot be satisfactorily resolved, the Permittee and the County will submit the dispute to nonbinding mediation before filing a complaint in any court of law.
3. Term of Permit. This Permit shall be in effect for 10 years from the date of issuance so long as the Permittee is in compliance with this Permit. The County may, in its discretion, extend the term of the Permit upon written request of the Permittee, following a public hearing.
4. Commencement of Project. If the Permittee fails to take substantial steps to commence the Project within three years from the date of issuance of this Permit, then the Permit may be revoked or suspended by the County following notice and public

hearing. The County may, in its discretion, extend the time period to begin development upon written request by the Permittee, following a public hearing.

5. Transfer of Permit. This Permit may be transferred in whole or part to another party only with the written consent of the Board of County Commissioners. A proposed transferee shall demonstrate that it can and will comply with all the requirements, terms and condition contained in the Permit.

6. Permit Violation. Failure to comply with any portion of this Permit is a violation of the Chaffee County 1041 Regulations and is subject to the enforcement provisions therein.

7. Annual Reporting. Permittee shall submit an annual report to the County on December 1 of each year covering the preceding November 1 through October 31 water year that describes progress on the Project and compliance with Permit conditions, including but not limited to water pumping operations; wetland and groundwater monitoring; wetlands and hatchery restoration; land management plans; utilization of local work force for construction, trucking and service, local materials, and describing any nonlocal labor use or material purchase; trucking volumes and trucks utilized; a description of community involvement efforts; and endowment funding and disbursements.

8. Permit Condition Review Costs. Permittee shall be responsible for reimbursing the County for reasonable costs of technical and legal consultants that the County retains as necessary to review documents and reports in connection with this Permit. Permittee shall reimburse the County within 45 days of receipt of an invoice from the County documenting the expenditures.

9. Permit Enforcement Costs. In the event that the Permit Authority determines that enforcement action is necessary, the County shall enforce the Permit in accordance with the existing enforcement procedures. In determining whether a violation exists, if the Permit Authority does not have the expertise to evaluate an alleged violation, the Permittee shall be responsible for reasonable costs associated with consultants that may be necessary to determine whether a violation has occurred.

10. Water Litigation and Administration Costs. Permittee shall submit its proposed Substitute Water Supply Plan and Plan for Augmentation to the County at least 30 days prior to their respective filings in accordance with conditions no. 31-42 of this Permit. Permittee and the County shall develop a not to exceed budget and number of water legal counsel and water engineer hours required to review these documents prior to submittal to the State Engineer's Office or water court, respectively. Permittee shall reimburse the County for the costs and fees incurred during this pre-filing review of the Permittee's application(s), up to the amount of the not to exceed budget. After the Permittee's application is filed, Permittee shall pay the County's court filing fees associated with participating in the adjudication of Permittee's Plan for Augmentation as an Opposer, as well as reimburse the County for all of its attorney fees and costs associated with participating as an Opposer in the Water Court and/or State Engineer Substitute Water Supply Plan proceedings. In addition, Permittee shall reimburse the County for all legal and engineering expenses incurred in administering, reviewing and enforcing the Permit and the terms and conditions of the Permit.

11. Hagen Exception. Any metes and bounds or other description of the Hagen exception from the Bighorn property does not create a separate legal lot or parcel unless or until a parcel is created through the County subdivision regulations. Change to the description of the Hagen exception description shall require amendment of the permit.

12. Financial Security. Prior to any construction, Permittee shall post a guarantee of financial security deemed adequate by the County and payable to

Chaffee County calculated and administered in accordance with the requirements of Section 2-402 of the Chaffee County 1041 Regulations. As part of that process, Permittee shall prepare and submit to County staff cost estimates for reclamation of the site and construction of project features in compliance with permit conditions.

13. Compliance with Other Permits. This Permit is contingent upon Permittee's compliance with all other County, State and Federal permits and approvals required for this Project, including but not limited to the Special Land Use Permit for this Project. This permit shall not constitute an exemption from Chaffee County zoning, building, health or other applicable regulations and codes.

Water and Wildlife Habitat

14. Bighorn Springs Land Management Plan. Within 30 days of the effective date of this Permit, Permittee shall meet with County staff to discuss what elements will be required in an acceptable final Bighorn Springs Land Management Plan. Prior to operation of the Project, Permittee shall obtain approval from the County of a final Land Management Plan for the Bighorn Springs parcel. Plan components shall include but are not limited to sustainable grazing practices, wildlife friendly fencing, long-term bighorn sheep habitat protection, riparian and wetland restoration practices and other long-term habitat management conservation techniques.

15. Ruby Mountain Land Management Plan. Within 30 days of the effective date of this Permit, Permittee shall meet with County staff to discuss what elements will be required in an acceptable Ruby Mountain Land Management Plan. Prior to operation, Permittee shall obtain approval from the County of a final land management plan for the Ruby Mountain parcel. Plan components shall include but are not limited to prohibition of grazing, wildlife friendly fencing, long-term bighorn sheep habitat protection, riparian and wetland restoration practices and other long-term habitat management conservation techniques identified by CDOW and NRCS.

16. Hatchery Restoration. Within 60 days of the effective date of this permit, and prior to operation, Permittee shall submit to and obtain approval from the County staff for a final Riparian and Wetlands Restoration Plan for the Hatchery ("Hatchery Restoration Plan") to remove the existing hatchery structures and restore conditions to a more natural state. The restoration plan shall include a component allowing and encouraging local educational institution access and participation in the restoration planning and work. In addition to a description of the work to be performed, the Hatchery Restoration Plan shall include a list of required state and federal permits that will be necessary for the work and a proposed timetable and phasing plan for permitting, construction and completion of the work. The Permittee shall initiate and diligently pursue the approved Hatchery Restoration Plan within six (6) months of the approval of the Hatchery Restoration Plan by the County.

The Permittee shall provide the County with a copy of all documents that it submits to the Army Corps of Engineers or other state or federal agencies to obtain permits for the Hatchery Restoration Plan at the same time those are submitted. The Permittee shall also provide the County with copies of responses and / or correspondence from those permitting agencies, and copies of such permits once they are issued.

The work to accomplish the Hatchery Restoration Plan shall be fully implemented no later than three (3) years from the date the US Army Corps of Engineers issues required permits, unless a longer time period is approved in writing by the Board of County Commissioners following a public hearing. In the event no state or federal permits are required from the USACE, the Hatchery Restoration Plan shall be completed in accordance with the timetable in the approved Hatchery Restoration Plan unless a longer time period is approved in writing by the Board of Commissioners, following a public hearing.

17. Groundwater Monitoring and Mitigation Plan. Prior to any pumping from Project wells other than pumping necessary to establish baseline conditions, Permittee shall submit to and obtain approval from the County staff for a final Groundwater Monitoring and Mitigation Plan. At a minimum, the plan shall include up gradient

aquifer monitoring, define the indicators that will be used to determine whether the Project is causing any negative impact to water resources, and identify the mitigation steps that will be implemented to avoid degradation of water resources.

18. Wetlands Monitoring and Mitigation Plan. Prior to any pumping from Project wells other than pumping necessary to establish baseline conditions, Permittee shall submit to and obtain approval from the County staff a Wetlands Monitoring and Mitigation Plan designed to ensure that Project pumping will not cause degradation of wetlands, riparian areas and related wildlife habitat. At a minimum, the plan shall define indicators that will be used to determine whether the Project would cause any negative impact to wetlands and identify the mitigation steps that will be implemented to avoid degradation of wetlands. The plan shall also include the recommendations proposed by the Colorado Natural Heritage Program in its April 14, 2009 letter.

19. Pumping Rates. The impacts to the surface and ground water resources are based upon certain assumptions regarding pumping rates, replacement water, timing, etc. Because the Project impacts are assessed on the basis of these assumptions, the Permittee shall not pump at rates more intensive than those set forth in the Application.

20. Endowment. Permittee shall fund a public foundation or 501(c) (3) nonprofit corporation with an initial endowment of \$500,000.00 and future annual programmatic contributions. These funds must be dedicated to projects and activities that are focused on Chaffee County community sustainability.

#### Access / Easements / Exception

21. Right-of-Way. Within 30 days of the effective date of this Permit, Permittee shall dedicate a sixty (60) foot right of-way ("ROW") for CR 300, centered on existing roadbed as identified on the Bighorn and Ruby Mountain Springs Site Plans, most recent submittal dated 5/4/2009. The ROW shall contain construction limitations to protect the spring sources.

22. Wildlife Friendly Fencing. Within 30 days of the effective date of this Permit, Permittee shall remove existing fencing along the west side of the ROW for CR 300 with wildlife friendly fencing installed along the newly dedicated ROW boundary.

23. River Wade Fishing. Within 30 days of the effective date of this Permit, Permittee shall dedicate a wade fishing easement to Department of Wildlife ("DOW") on the Bighorn and Ruby Mountain properties.

24. Fishing Access. Permittee shall work with DOW to establish parking areas and fishing access easement over Bighorn parcel at appropriate locations.

25. Conservation Easement. Permittee voluntarily amended the Application during the May 21, 2009 Public Hearing to offer to place Project lands into a permanent Conservation Easement. Accordingly, a Conservation Easement is now deemed to be within the scope of the Project as committed to by the Permittee. To ensure that the Conservation Easement is implemented in a timely fashion, upon completion of the Ruby Mountain Trout Hatchery restoration, Permittee shall dedicate the voluntary conservation easement to an appropriate land trust or other organization authorized to hold such easement. Easement holder shall consent to the terms of this permit, including but not limited to groundwater and wetland monitoring access, fishing access, land management, and educational program access to the project lands.

#### Construction Conditions

26. Pipeline Requirements. Prior to any construction, Permittee shall submit to the County Attorney executed road access permits, permits to construct within the County right-of-ways, easement and right-of-way dedications and licenses pertinent to the pipeline. In addition, Permittee shall submit executed ditch crossing agreements and comply with archaeological construction requirements.

27. Buildings and Structures. Prior to any construction of any building permits for the load station or well houses, Permittee shall obtain demolition, building and other permits required for each structure.

28. Construction conditions imposed as part of the Special Land Use Permit. Prior to beginning any earthwork or construction of any kind, Permittee shall coordinate with County staff to develop a construction management plan that satisfies all of the construction conditions imposed as part of the Special Land Use Permit.

#### Economy

29. Local Construction Jobs. To the extent that workers are available in Chaffee County, Permittee shall contract with local firms for all Project related construction work as represented in the THK report dated May 4, 2009, with exception of work related to tank fabrication and directional drilling. Project materials and supplies shall be purchased locally, and future service contracts shall be with local firms. For purposes of this Permit, local shall mean Chaffee County residents, and where those are not available, workers and drivers who reside within a 25 mile radius of the Project site.

30. Local Drivers. Permittee shall ensure that trucking operations are staffed with at least 50% drivers from Chaffee County as represented by the letter from Westco Express, Inc, dated April 14, 2009. If qualified drivers are unavailable, Permittee shall make best efforts to offer training or apprenticeship to local drivers. Permittee shall document efforts to hire and train local workers and drivers in the annual report.

#### Project Water Supply, Water Rights Augmentation

31. The augmentation water for depletions caused by Permittee's well(s) shall be from water leased to Permittee by the City of Aurora and shall be subject to all of the terms and conditions of this Permit. No other augmentation water source is authorized under the Permit. Permittee shall ensure that all augmentation water supplied to offset Project depletions by Aurora shall be derived from transbasin water from Aurora's Colorado River sources or from consumptive use credits to the Arkansas River for in priority changed water rights from Aurora's existing Lake County municipal water rights portfolio. No augmentation water shall be directly or indirectly supplied by Aurora from native Arkansas River water originating downstream of the Project depletions.

32. Project depletions from the withdrawal of water from Project wells shall be limited to the net amount of replacement water available to the Arkansas River in time, place and amount. Releases of augmentation water from Aurora's existing Lake County storage facilities or consumptive use credits to the Arkansas River for in priority changed water rights from Aurora's existing Lake County water rights portfolio shall match the depletion schedule in time and amount.

33. Permittee shall at all times operate in conformity with the terms and conditions of a State Engineer approved substitute water supply plan ("SWSP") or a water court approved plan for augmentation. No water shall be withdrawn from Project wells until an adequate SWSP or plan for augmentation is approved. The County shall have the right to fully participate as an objector in the SWSP and water court proceedings.

34. All augmentation water to offset Project depletions must be physically delivered to the Arkansas River above the Project depletions. The Aurora release points in Lake County meet these requirements. Augmentation water cannot be delivered by exchange from downstream water rights to the point of depletion, nor by exchange by Aurora into storage of downstream native water rights. Any change in the augmentation water source or augmentation water release point would require reopening of the permit in accordance with the County's regulations.

35. To ensure that the increased demand created by Permittee's lease with Aurora does not cause Aurora to make increased diversions and exchanges of native water within the Arkansas River Basin for Aurora to makeup or replace the amount of augmentation water leased to Permittee and to ensure that Aurora does not indirectly provide the augmentation water for Project depletions from increased exchanges of downstream native Arkansas River water rights, the following conditions shall be imposed upon the Permittee and the Project augmentation water source:

During any period of time that Aurora is exercising its rights to exchange any Category 2 leased water under the October 3, 2003 Intergovernmental Agreement between the Southeastern Colorado Water Conservancy District and the City of Aurora (the "Aurora Southeastern IGA") through Chaffee County, Permittee shall cease pumping its Project wells.

Permittee shall be required to provide to the County accountings from Aurora detailing all of Aurora's water supply and demand operations, within and without the Arkansas River Basin, including storage capacities. The reporting from Permittee to the County shall be done monthly utilizing daily data from Aurora.

Permittee shall be required to promptly notify the County at all times that Aurora is exchanging Category 2 leased water and it shall voluntarily cease pumping the Project well(s) during all such times. Permittee shall ensure that Aurora provides Permittee with advance notice of its intent to conduct any Category 2 exchanges so that Permittee can ensure that it suspends its pumping operations while Aurora's Category 2 exchanges are occurring.

In the event that the County determines that the Project augmentation water is being indirectly provided by Aurora through increased exchanges of native Arkansas River water, then the County shall have authority to suspend operation of this Permit and to impose additional terms and conditions upon Permittee's Project operations to ensure compliance with the intent of this Permit that all augmentation water derive from Aurora's transbasin sources or consumptive use credits from Aurora's Lake County water rights as provided above.

If Permittee pumps a Project well during periods of time when Aurora is exchanging Category 2 water in violation of this provision, then Permittee's Project well pumping shall be reduced by three acre feet for each day that Permittee has pumped its project wells in violation of this provision.

36. The Permittee shall install and operate a maximum of two production wells at the Ruby Mountain site known as RMBH 1 and RMBH 2. RMBH 2 is an existing well and RMBH 1 is a well to be completed. Permittee shall not operate RMBH 1 and RMBH 2 simultaneously. RMBH 2 will be the principal production well and RMBH 1 will be a backup well in case RMBH 2 fails or is temporarily unavailable (i.e., due to maintenance). Diversions from either RMBH 1 or RMBH 2 will not exceed 200 gallons per minute, nor more than one (1) acre foot per day, or 16.6 acre feet in any one month.

37. RMBH 1 will be completed within 200' of RMBH 2. Both RMBH 1 and RMBH 2 shall be constructed similar in depth and completion, including the screened interval and depth of the pump setting, as existing RMBH 2. RMBH 1 and RMBH 2 shall not be operated in a manner that will cause the water levels in the well to drop below one foot (1') above the top of the screen.

38. Permittee shall install a measuring flume on the ditch in the approximate location as shown on Permittee's Figure \_\_\_\_ attached and incorporated by this reference (the "upper flume"). Permittee shall maintain at all times during the Project the existing measuring flume located at the far downstream end of the ditch (the "lower flume"). Each flume shall be equipped with a continuous recording device that is properly maintained and calibrated by Permittee. Permittee shall record daily flow measurements of the upper flume and lower flume and provide the data monthly to the County. Said data recording and reporting shall commence within 30 days of the date of issuance of the permit and continue for so long as the project is operating.

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39. Permittee shall cease pumping of RMBH 1 and/or RMBH 2 in the event operation of the project wells causes a decline in the water table, a decrease in spring discharges at Ruby Mountain Springs 1, 2, 3 and 4 or a decrease in the flow in the ditch to levels at or below what the reconstructed wetlands at Ruby Mountain need to maintain and sustain.

40. Permittee shall insure that any increases in consumptive use from evapotranspiration or evaporation at the reconstructed wetlands at Ruby Mountain versus the existing uses at the Ruby Mountain site must be fully augmented with Permittee's authorized augmentation water source. The reconstructed wetlands shall be a part of the Permittee's SWSP and permanent plan for augmentation.

41. The Permittee shall cease diversions from Project wells within sufficient time near the end of the lease term with Aurora so that any lagged depletions are fully replaced by the end of the lease term. No more than 5% of lagged depletions or post pumping depletions may be replaced by a onetime or bulk release at the end of the Aurora lease term.

42. Permittee may not purchase, lease or acquire, directly or indirectly, other water rights or dry up irrigated lands in Chaffee County to make water either legally or physically available for the Project wells.

#### Traffic / Air Quality

43. Trout Creek Pass Improvements Lobbying. Permittee shall cooperate with County in lobbying Colorado Department of Transportation for improvements to Trout Creek Pass.

44. Limits on Truck Traffic. Permittee shall limit truck traffic to no more than 25 loaded trucks per day, with no more than two trucks per hour. In peak hours, truck traffic shall be limited to no more than two loaded trucks per hour, with an average of one per hour for the peak hours of each day. Peak hours are from 11:00 a.m. to 6:00 p.m. from the start of the Memorial Day weekend through the end of Labor Day weekend. Such peak hour restriction shall be in place until at least one climbing lane is established on eastbound Trout Creek Pass. At such time a climbing lane is established, the Permittee may petition the Board of County Commissioners for removal of the peak hour restriction.

45. Emission Standards. Permittee shall require that all trucks used for the Project meet the most stringent emission standards adopted at the federal, state or local level and shall utilize the latest emissions control technology.

46. No Idling During Loading. Trucks shall not idle while loading.

#### Mitigation Fund

47. Mitigation Fund. To ensure that representations of Permittee are correct that the Project will not cause an increase in costs to Chaffee County or other governmental entities in Chaffee County, Permittee shall fund during the life of the Project a Chaffee County Mitigation Fund that will be used to reimburse local governments in Chaffee County for costs associated with the direct impacts of the Project, pursuant to the Mitigation Fund Guidelines in (Appendix \_\_\_\_). The Permittee shall transfer \$50,000 to the Mitigation Fund upon thirty (30) days approval of the Permit and maintain the Fund balance for the Project's operation and duration.

County Attorney Davis stated that there were two procedural issues. There had been a request by the applicant to continue the phase of the hearing and deliberations to give them more time to develop comments on the conditions that were circulated on Friday and Saturday. There was also a request from the people who were opposed to the application to reopen the comment portion of the hearing to allow both sides to make comments to the Board on the conditions.



Chairman Holman asked if the opposition would like to speak first. He stated that if they had a spokesperson that would be fine. The Board would not allow requests for testimonies.

County Attorney Davis stated that the Board had been provided a copy of the letter that they had sent and the one Nestle Legal Counsel Holly Strablizky sent.

John Graham, 9555 County Road 175, Salida, commented on the letter sent from his organization, Chaffee Citizens for Sustainability, where he served as a board member. They had a brief chance to review the conditions and noted that the conditions were a very extensive set of documents. They were very pertinent to the application and to a possible permit. They felt that the conditions were just as important as the application and to all the discussions they have had about the application to this point. For the process to really responsibly reflect comments on the condition was just as important as the other comments. The Committee would really like to see the public have the chance to express itself concerning the implications, the meaning and understanding of the conditions. He also requested that the many consultants that were involved in the process who made comments to the Board, that they may be presented with a copy of the conditions so that they could make comments back to the Board and to the community, with their observations of the implications that the conditions have on the entire application. He asked the Board to consider his request. He asked that the public to be involved as it was before. This would require a reopening but they felt that the conditions were not like a separate entity to be put to the side and not be discussed with the same enthusiasm, vigor and justice as the rest of the application.

Nestle Manager Bruce Lauerman, Nestle Water, 2690 Park Drive, Helena, Montana, stated that his request was not a response to the previous request but to clarify their request. He would agree that the conditions were very important. Conditions are often put on land development projects to clarify the project and to make sure that the project is enforceable and attainable and to make sure that those things, not directly covered under the code, are clarified and spelled out. He stated that certainly would be the case concerning their project. It was a 1041, which is extensive and has been going on for nine months now with many comments and concerns. It made sense to him that there would be a significant list of conditions. What they were asking for was for more time. They were not writing the conditions of approval. They had some suggestions on the conditions but that they were the County's conditions. They had a unique perspective being the applicant as they had operated these kinds of projects around the country and had experience here as to what was attainable and affordable. They did not want to be out of compliance as they feel the conditions are important. They would like some time to work with the staff and to offer their perspective to them. He wanted to make sure that they were informed, which was the basis of their request. They would like to use the time they had today, if the Board choose to do so, to meet because all the different parties were present to work on the conditions. He noted that there were forty seven conditions. There were maybe ten that they would like to understand better. Some of these conditions were completely acceptable as they were and some may need some work to ensure that they could be depicted, attained and enforced. Some of these conditions they need to make sure that they meet code requirements and that they reflect the testimony and deliberation that they heard from the commission today. They were here to help and would like some time to talk with County Staff face to face to help provide better documents.

County Land Use Counsel Green stated the Board needed to make a motion on each of the requests.

Commissioner Giese stated that he wanted to review the conditions, not to make a decision, but to better understand them. He had questions about them. Through this process it might give both sides a better understanding. It would help them, the Commissioners, in their deliberation to decide what conditions were appropriate and inappropriate and what conditions they had questions about. After reviewing the



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conditions today, they would then decide if the request for more time should be allowed, which he thought was reasonable or if they should open up the conditions to more public comment.

In regards to Mr. Graham's request, Commissioner Giese stated that as much for understanding the conditions as opposed to comment, he felt that they were equal requests. He asked what all of the repeats really did mean. He stated that only the author could be asked to understand this to have a better understanding. By that process, it gave them a better understanding and a decision of whether or not to open up the conditions for more public comment afterwards.

Commissioner Glenn felt that the Board had closed public and Nestle comments a long time ago. The Board of Commissioners deliberated on the testimony, on the issues, and they came up with the direction for the County Staff to give them some graph conditions to review, which they had done. He believed that they were the County's conditions, not Nestles. He did not believe that they were even the public's conditions. He felt that they were their conditions that were generated from the testimony that the Board received and the concerns that were heard. He believed that Nestle had every opportunity to offer any condition on their permit that they wanted when they had an open session. He stated that if they open it up for one, they need to open it up for both or not at all.

Chairman Holman agreed with Commissioner Glenn. He believed that they had worked a long time to reach this point where they had these conditions. He did believe that the Board needed to review them, ask a number of questions and clarify and request the staff to do some more work on them.

Commissioner Glenn commented that they had the input they needed and he was unsure of reopening it.

Commissioner Giese stated that he was not ready to make a decision to reopen at this time.

Chairman Holman agreed with Commissioner Giese suggestion earlier, regarding reviewing the conditions to get a better understanding of both sides and then making a decision to reopen or not. He asked County Land Use Counsel Green, from a legal perspective, what to do with the two requests as he was unsure if they needed to determine what to do with the two requests before they started to look into the conditions or could they do what Commissioner Giese suggested and look into the conditions and then make a decision at the end of the day.

County Land Use Counsel Green felt that the Board did have to decide now on Nestlé's request, because she understood that they were requesting that you stop and walk away today. She thought that they needed to decide that first and then with respect to whether or not they open up the record request, they would have a couple of options. They can say, no they did not want to ever open up the record request or yes they did want to reopen the request and would reopen it at their next meeting after notice or they would like to wait and make that determination.

Commissioner Glenn asked County Land Use Counsel Green if the record was to be reopened, could it be reopened on a very narrow scope and for a very specific area.

County Land Use Counsel Green stated that was correct, but that the Chairman would have to use the gavel ferociously, because once it was open it was very difficult. She felt that if she opened it up for one then she needed to open it for everyone but that they could open it up for one issue or issues.

Chairman Holman asked if the request from Nestle was to table this or not deliberate on the conditions until they had an opportunity to meet with the staff to work out some of these issues.

Chairman Holman made a motion that the Nestlé's request be denied. Commissioner Glenn seconded the motion. Under discussion, Commissioner Giese stated that he wanted a discussion before voting. He would like to accomplish today was that they go through the conditions so they have a better understanding of what the conditions are. His understanding of Nestlé's request was that the hearing was to be continued at a later date. He would like to have the opportunity, in public, to go through these conditions, to make comments on them and what he has questions and concerns about. He did not want to wait two weeks and then do the same thing again, because he agreed with Commissioner Glenn that those were their conditions. He felt that the Board needed a chance to do that.

County Land Use Counsel Green stated that she would try and set the stage just a little bit. When they last left off, there was no decision made. They had deliberated and identified areas where they felt the applicant had satisfied their burden of proof and satisfied conditions on a preliminary basis. There were no votes taken or anything like that. They had also identified areas in the regulation where they felt that the applicant had not met their burden of proof, where they thought a condition or conditions might be appropriate. All along from the beginning of the process, the planning staff with every staff report, always had some running list of conditions that they had offered. The applicant also, over the course of the hearing, had a running list of proposed conditions or changes to the application that they had suggested. The public had also mentioned some ideas that they thought the property could be better mitigated. She continued stating that they had not made any decisions and they had directed them to come back on the basis of the discussion with a list of conditions of those areas where they thought there was a concern. She would like to reread the sections about regulations to help with the context and for the public as well. This was after the hearing had been closed. She then read: "A permit application proposed project may not be approved unless the applicant satisfactorily demonstrates that the proposal, including all mitigation measures proposed by the applicant, complies with all the applicable criteria set forth in these regulations." She stated that the Board cannot approve it unless the applicant satisfactorily demonstrated that the proposal and mitigation measures complied with the criteria. She commented that if they stopped right there and if there were any questions on any criteria, it would have to be denied. She continued reading, "If the application does not comply with all of the applicable criteria, the permit shall be denied, unless the permit authority determines in its discretion, that reasonable conditions can be imposed on the permit which will enable the applicant to comply with the criteria." The only reason they could impose any conditions at all would be if they decided not to do it all together and in their discretion that there were conditions that would enable the applicant to comply with the criteria. It was pretty specific that it was totally at their discretion to deny or impose conditions. It was different from other regulatory schemes or structures. It was different from a Special Land Use Permit Process. It was different from a Conditional Use Permit Process because it was all based on conditions in lieu of denying it outright. She asked if there were any questions.

Commissioner Glenn stated to be perfectly clear, they had draft conditions on certain issues that they felt where the criteria had not been met. As they worked through them, all of them could get to a point where even though they had conditions that they still felt that it was not going to work. He did not want to give the thought, through that process, that even if they hammered out the conditions in the written form and add to them that was the end of the discussion that he was still not there one way or another.

County Land Use Counsel Green commented that it was very clear that there was nothing that required them to impose conditions and that the denial was something that they felt that the applicant had not born his burden of proof. It had to be denied. The whole idea of conditions was absolutely discretionary and it was in lieu of a flat out denial. So that was the posture that they would begin from. With respect to these particular conditions in front of you, there were three categories of conditions. There are general conditions which she would call administrative conditions that would be

seen in any permit about financial security and the term of the permit. Then there are conditions that relate to the permit criteria that they did not think had been satisfied and tried to generate those conditions from going through the record and working with County Development Services Director Reimer trying to come up with something. They also relied on the conditions that Nestle had suggested along the way as well to come up with a hybrid for discussion. In those sets of conditions there were many questions. She used an example of where it will just say count and you did not know if it meant the Board of County Commissioners or the staff. Finally there was a list of conditions that she would say were holding Nestle to its promises because Nestle made many of representations during the course of the hearing and in their application. They stated that they did not think that they needed to do this but were offering to do this. For example, restoration of the hatchery, by the same token Nestle during the course of the preceding and in their application represented that with respect, the visual impacts criterion. One way they were clearly satisfying that was by the restoration of the hatchery. In that set of conditions, it was more like the things that were offered by Nestles. She would call them mitigation. They offered them up. In order to figure out a way legally and procedurally to ensure that they accomplish what they set out to do in a fashion that allowed you to know whether or not they accomplished it. These conditions are the most important as far as input at the staff level to County Development Services Director Reimer or County Attorney Davis from Nestle on warding them in terms in what they had offered up. There may be situations where it was suggested to be done in a particular order and Nestle may say that will not work for them. She stated that kind of a discussion at the staff level about what would work in terms of what they offered, she felt was completely appropriate and that had been happening and will continue to happen. It was very different from any kind of discussion. The public, the organized opposition and everybody else had the same opportunity to call County Attorney Davis or County Development Services Director Reimer to talk about conditions anytime along the way. She stated that they were open to that. It was an open staff process but that was different from an open public hearing process where the Board had taken into that debate, because they decided to move into the deliberative phase. Later on if they wanted to open it up to the public, they would be basically bringing the public into the deliberation. They almost become the Board of County Commissioners. The applicant and the public almost end up sitting with the Board as they deliberate in their discretionary area. In terms of order of conditions, she felt that it would be best if they would start with what she would call the water conditions because they were the most technical and most complex. They would require the most massaging for all to understand. With that being said, she turned it over to the Jim Culichia, County Water Counsel.

County Water Counsel Culichia stated that there was a request to put together a list of conditions that would reflect some of the concerns that were raised during the many various and public hearings. He attempted to do that if they are talking about the specific water conditions as County Counsel Green indicated earlier. He stated that everyone should have a copy of the memo that was circulated to Nestle and to the other involved parties. Starting at paragraph thirty one, he was unsure how they wanted him to go over it procedurally.

County Land Use Counsel Green felt that he should explain each one unless Chairman Holman felt that they were real self evident.

Chairman Holman stated that some were and some were not. Commissioner Giese and he struggled with a couple of them.

County Water Counsel Culichia stated that he would just give an overview for some of the bigger issues and some are stated as a kind of preface language in a couple of the conditions. The applicant proposed to pump wells that would cause depletions to the Arkansas River. To do that, because they were a very junior water right, they needed to have a plan for augmentation to replace the depletion that their pumping causes. The replacement of those depletions would have to come from an outside water source that replaced the river in a time, place and amount, which was their statutory

obligation. There was also the 1041 obligation to not degrade water equality and quantity as it related to county specific criteria. The Augmentation Plan and Augmentation Water Source was a lease of two hundred acre feet of water from the City of Aurora. One of the discussions from the outset of the project, and Nestle had agreed, was that the water Aurora uses for augmentation of the depletions to the Arkansas River not be water that originated from downstream that Aurora had. Aurora has a very complex water rights portfolio. They have fifty thousand acre feet of water that they get from all sorts of sources. They have tons of water over in South Park and the upper Platte River. They have water that comes from the western slope from the Colorado River Basin. They have thousands of acre feet of water below Pueblo Reservoir from the Rocky Ford Ditches. The potential for additional sources of water through interruptible supply agreements which are short term leases with farmers below Pueblo Reservoir. They have storage accounts and most of Aurora water runs through the Otero Pump Station which is north of there. What they wanted to avoid was, what Nestle agreed all along, the water to be delivered as augmentation water to Nestle originating from water that would not be native to the Arkansas River, which meant that the Colorado River Sources, Aurora had on the west slope or the consumptive use water, Aurora had in Lake County. Consumptive use water would never flow through Chaffee County as it was a legitimate source. It was not water coming from below Pueblo Reservoir that was being delivered by exchange up to storage in Turquoise and Twin Lakes. They had that agreement with Nestle very early on. A lot of the conditions that followed what he had drafted in the previous weeks were trying to flush out the essential agreement to allow Aurora to make up the water that they would have otherwise had sent to the front range to their customers from the Colorado River source or from Lake County by refilling it by exchange, increasing amount of water exchange below Pueblo Reservoir. It was an overriding concern, some of the more complicated conditions that they suggested. He stated that was spelled out in condition thirty one that they wrote, that the augmentation water supply to offset depletions either ride from Colorado water sources or consumptive use credits from Lake County. He reiterated what County Land Use Counsel Green stated earlier that the one of the components of the conditions was to put teeth into agreements in representations that Nestle had made. They had agreed to this early on. This was an attempt to enforce that. He stated that was what thirty one basically was, that kind of background. He stated that condition thirty two was the condition where the depletion from project wells would be limited to the net amount of replacement water available in time place and amount. He stated "net" because there would be a small component of transit losses between Lake County down to point of depletion if the project was approved and the wells were pumped. He stated that there was a small subtraction of water. So it was the net amount. They lease two hundred acre feet but that they would not actually pump that amount. It was more like one hundred ninety six. He stated that would be all spelled out in the augmentation plan and the substitute water supply plan if and when they get approved. He pointed out paragraph thirty three was a standard thing that stated in order to pump the wells there would need to be a substitute water supply plan or plan for augmentation. A substitute water supply plan was a temporary plan for augmentation that the state engineer is allowed to approve under limited set of circumstances. The state engineer had the authority to approve a substitute water supply plan where it was a very short term temporary project and it can not exceed five years. If there was a water court application pending, then the state engineer could approve a substitute water supply plan while the water court case was going on. Under these two circumstances, the state engineer had the authority to approve an augmentation plan. Otherwise, only the water court could approve a water augmentation plan. Nestle had to have one or the other. The substitute water supply plans are much shorter process than going through in the water court but the water community gets notice and has the ability to participate and provide comments and objection so it is not done in secret. This is an expedited administrative proceeding that goes in tandem with while the water court drags on. The water court process, the quickest it can usually be done, was two years if it is really speedy. Two to three years is a reasonable amount of time frame for a plan of augmentation to go through the water court. He thought that Nestlé's plan was to file for the substitute water supply plan earlier on. That is how they get their first year or

two of approval if they approve the project and if the state engineer approves the project.

Commissioner Giese asked for clarification as to when the state engineer decided that the longest that it could be in place was five years.

County Water Counsel Culichia replied as long as there was an application pending. The five year was if there was a five year gravel pit or some real short term use. There did not need to be a water court application pending.

Commissioner Giese asked for whatever reason would their application drag on for six or seven years. He asked if they would need to go back and reapply for another while the water court application was still pending.

County Water Counsel Culichia stated that a substitute water supply plan was only good for one year. Nestle would have to do that every year.

Commissioner Giese asked if the five year maximum applied.

County Water Counsel Culichia replied that it did not apply if there was an application pending. Normally, the water court did not take five years but they renewed each year. There was a fee and a publication and all the same kind of stuff each year. He stated that paragraph thirty four further stated that the augmentation water had to be delivered upstream of the depletions. The agreed upon points of release for the augmentation water in Lake County were good, because they were fifteen twenty miles upstream of where the project wells were. It stated that the water could not be delivered by change from downstream water rights to the point of depletion. He state that meant a lot of augmentation plans could be approved without actually delivering the water upstream of where the depletion occurs. If there was a free flowing river, most of the senior water rights were on downstream. You can augment any of the calls as long as you deliver water to the calling water right. There might be a hundred mile stretch of river that was not being augmented. As long as the calling water right was fully augmented, there was no harm in the traditional water court sense, but in a 1041, it was a difference. There is a different criterion to apply which was different from the water court which strictly states that as long as the people below Pueblo Reservoir, the irrigators with the more senior water rights get their water. Aurora could not make up these depletions caused by Nestle releasing water out of Pueblo Reservoir. He stated that what was left here was the stretch through Chaffee County, un-augmented physically. You could augment by exchange in water court. This stated that could not be done here and Nestle had agreed to that. This was a way to make sure water went through Chaffee County equal to what was being pulled out. He continued with paragraph thirty five stating that by agreeing to the lease between Aurora and Nestle, Aurora had voluntarily taken on an additional obligation that was outside of their traditional service area. They had incurred two hundred acre feet in excess demand that they did not have the day before they signed the lease. It was not irrespective of the houses that might be built in Aurora over the next fifty years. This was two hundred acre feet of additional demand. The agreement and discussion all along had been that water not come from native source other than the Lake County consumptive use, essentially water that had not been seen. It never flowed through Chaffee County. The Colorado River Water, as well as Aurora had extensive rights too, since that water did not belong to the Arkansas. He stated in order to ensure that Aurora not go through the back door and make up that two hundred acre feet through native sources, they tried to craft terms and conditions to put limitations on the exercise. It was very complex. It was difficult Aurora had such an extensive portfolio of water rights. One year they might divert some over here and some over there. It will be very difficult to keep tabs on. It was suggested in sub paragraph A related to an agreement between the City of Aurora and the Southeastern Water Conservancy District back in 2003. It related to Aurora's getting storage space in Pueblo Reservoir and in the upstream Lake County reservoir storage buckets. It attempted to put limitations on the total amount of water that Aurora can pull out of the Arkansas River. Aurora had extensive

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rights on the Arkansas River including exchanges from their downstream rights up to Otero and Lake County that predate anything that the county had ever done including the RACD. Part of the negotiations between the southeastern district and Aurora attempted to put limits on what Aurora could do and exercise the water rights that they had inside the basin. They had this very complex intergovernmental agreement between Aurora and the Southeastern District. One component of the IGA between Aurora related to what was called Category II Leased Water, which was a specific defined term in the IGA. He mentioned it earlier that the short term leases interruptible supply agreements that Aurora had in the past and could easily obtain again in the future. Primarily with the farmers downstream and Pueblo Reservoir leasing lease water, bring that water up to Otero or into Pueblo Reservoir in kind of a bulk exchange, wait for an opportunity to exchange and bring it up to Lake County. That was essentially how Aurora wanted to do it. To do it effectively they needed permission from Pueblo Reservoir and to use the upstream storage here. They did receive this agreement with Southeastern to limit the opportunities Aurora would have, both over the entire thirty years of the agreement to not take more than one hundred forty eight thousand acre feet of water or something to that affect. For these interruptible short term leases, it cannot happen more than three years out of ten and no more than ten thousand acre feet in any one year. There was an exception to that but that was essentially the term and it would only invoke the category to leases, when Aurora system wide storage, all storage buckets, was below sixty percent on March 15<sup>th</sup> of that year. He stated that was before runoff, so Aurora was not filling their buckets. That meant that they had been drawing their storage down below sixty percent. Aurora had an emergency plan adopted at sixty percent that consisted of cutting back on lawn watering and those kinds of things. They actually had it tiered at eighty five percent, eighty percent, seventy percent and then sixty percent. In their mind, sixty percent was a pretty severe water shortage on March 15<sup>th</sup>. These were the terms that kick in when Aurora could do Category II Leases. What they tried to do and the agreement between Southeastern and the City of Aurora intended that Aurora primarily do this during the dry years because when it was dry, farmers down below were not going to get their full yield. It was assumed that the farmers would be better off leasing their water to Aurora because they would not be able to fully irrigate. Aurora's wide storage system was not going to be below sixty percent unless it was pretty dry. This allowed Aurora to make up and put water into storage and would primarily occur in a dry year. The County did not have any control over Aurora's ability to do that because these were subject to decrees that they already had. He added that the County did have some control over, by virtue of the 1041 regulation was what Nestle did. The first section, Section A, was that anytime that Aurora was exercising a Category II exchange, Nestle had to shut down and their pumping could not occur. There would not be that additional issue that Aurora was, in fact, looking over the credits that they leased to Nestle via this downstream water and that shut Nestlé's pumping down during any of those events.

Commissioner Giese stated that he read the lease agreement three times and he was not better informed. His question was what Category II water was. He understood that it was short term leases that they iterated to anyone along the Arkansas but primarily irrigators below Pueblo Reservoir. The time that they could divert Category II Water was when those water rights were in priority and the reservoir was about sixty percent.

County Water Counsel Culichia stated that was below sixty percent on March 15<sup>th</sup> of the year.

Commissioner Giese stated as an example that Twin Lakes was at forty five percent, then they could go down, lease water and store the water out of the Rocky Ford Ditch in Twin Lakes to build their reservoir back up over sixty percent. If in fact that did happen, they were using Category II Water and then obviously Nestle, by this condition, had to quit pumping.

County Water Counsel Culichia stated that they had to shut down. He stated that avoided the ability for Aurora to assign the augmentation credits to Nestles depletions.

Commissioner Giese asked if they could only do that three out of every ten years.

County Water Counsel Culichia stated that was correct. It did not shut off once the storage hit sixty percent. This will give Aurora the ability to make up.

Commissioner Giese stated that it gave them the ability in a dry year to increase storage.

County Water Counsel Culichia stated that was correct. The ability to get above what is considered an unsafe level was sixty percent.

Commissioner Giese stated as an example if it was at forty percent and ten thousand acre foot, the pull in brings them up to sixty two percent. They do not shut off at sixty as they still get to up to the ten thousand.

County Water Counsel Culichia stated that it was make-up water.

Commissioner Glenn asked if the system was wide because obviously they had more reservoir storage than Twin Lakes.

County Water Counsel Culichia stated that it was a system wide including Aurora Reservoir.

Commissioner Glenn asked if it could be any reservoir that they had an interest in. He also asked if that was cumulative or any one drops before.

County Water Counsel Culichia stated that is was system wide, which would mean Aurora Reservoir. He thought that Aurora had some interest but not sure if it was in storage component. Anything that they build in the future or Lake County storage would be credited against that because there would have to be the discussions about box elder in Lake County.

Commissioner Giese asked if they could take the ten thousand out of the Rocky Ford ditch, pump it through the Otero pipeline and put it in Aurora Reservoir.

County Water Counsel Culichia stated that was what they would probably do now. They do not directly take out stream water, treat it and deliver it. Starting in 2010, Aurora will have the Prairie Water Project online. The Prairie Waters Project was the project downstream of Denver down below Brighton where Aurora had acquired large sections of land adjacent to the South Platte River, big gravel pits. They had lined them to make them impervious to inflows and outflows. When Aurora brings water over from the Colorado River or from Lake County consumptive use credits or Rocky Ford, that water was allowed to be used multiple times to extinction. Unlike an irrigation water right, it was used once and then the return flows go back to the river and those belong to the river. Then somebody else can divert them again. Consumptive use water or foreign water, Aurora had the right to use and reuse until extinction. The Prairie Waters project was designed to recapture all of the seward return flows that Aurora previously had just been sending down to Nebraska for the consumptive use rights that they were allowed to use and reuse to extinction. Aurora then can with Prairie Waters take out the return flows that they put in the river, take credit for it into the alluvial aquifer, and then eventually receive some secondary treatment benefits through the percolations through the gravels. Then they pump that water thirty miles back upstream to Aurora Reservoir. So in the past, Aurora Reservoir would have been declining, but now with Prairie Waters going online in 2010, it will give Aurora a circular use and reuse system. It is much more efficient than they have operated in the past. It is not adjudicated yet. He had spoken with Nestle Water Consultant Steve Simms the previous week and it is anticipated to go online sometime around 2010. This will be a good thing that really was not done by the time the IGA was entered into with Southeastern. It was on the drawing board and Aurora spent a hundred million dollars on that project. It did give them much greater drought



protection then they had in the past. He did not know if that would mean that they would never do a Category II lease and he would doubt that was what it meant. It was certainly better in terms of the outlook for their taking additional water out of the basin then it was ten years ago.

Commissioner Glenn asked how Chaffee County would know when Aurora was doing a Category II exchange.

County Water Counsel Culichia stated that was what B and some of these other terms were designed to accomplish. Certainly they were tightening up things and things like that could be done. What they wanted to do was require Nestle to obtain from Aurora and provide to us details of all their operations. Not just when they are doing a Category II exchange, because they are required to do that here, but also all Aurora's operations. They know how they are actually operating, what they are taking out of native water and what they are taking out of the Colorado River Basin water. The county consultant can see how they are doing. This is an obligation that can be imposed on the applicant, because the applicant has the burden to prove that the water that they are supplying meets the criteria and agreements. His suggestion would be that the applicant provide the County with detailed accountings. If they do not do that, there is no way of knowing.

Chairman Holman stated that Aurora did the accounting, then they send it to Chaffee County or to the applicant and then they send it for someone to evaluate it. He asked how were they to know that the accounting was accurate.

County Water Attorney Culichia stated that it is required to be accurate because of Aurora's obligations to the water court and the state engineer. There really was no other way to do it. All the providers, municipal providers primarily, are self-reporting. He stated that especially in the larger municipalities, they were very complex portfolios of water rights and they were required to report daily and monitored daily, sometimes weekly, sometimes monthly.

Commissioner Glenn stated that it was very hard for him to grasp because when there was a portfolio as extensive as the one that Aurora had, how does anyone keep track of it. He stated that there was accounting to track that but accounting numbers can be shifted.

County Water Attorney Culichia stated that he understood Commissioner Glenn's concern. He added that it was something that he struggled with because compared to fifty thousand acre feet of yield and two hundred acre feet, it made it difficult to keep track of. Aurora was required to provide accurate and detailed accountings, which they do on a daily basis.

County Land Use Counsel Green asked County Water Attorney Culichia how the report would come.

County Water Attorney Culichia stated electronically in excel format to County Development Services Director Reimer. He suggested a water rights person that would be familiar with this kind of set up to look at it and crunch all the numbers monthly.

Commissioner Glenn asked how this would be verified.

County Water Attorney Culichia stated that when you get numbers, they are deemed to be accurate because that was the information that was provided to the state. They swore that these were the numbers that were actually diverted. He was unsure if Aurora had more frequently reporting of daily data with monthly reporting or not as that was the norm.

Commissioner Giese stated that this was not just something that was generated because of the application. It was information that anybody could access if they wanted it. He stated that County Water Attorney Culichia was asking the applicant to get the information from Aurora and send it to Chaffee County.

County Water Attorney Culichia stated that the other parties that happen to be in other Aurora water cases probably get these accountings if they want them. It depended on the various decrees that Aurora had. He continued stating that some of the parties that were in the Rocky Ford change cases, for example, might want to get notice and get accountings any time they were diverting the Rocky Ford water. Others that might look at the accountings were Denver and some of the larger areas on the Front Range. It was something that they were obligated to do in all of their water rights cases. He reiterated what Commissioner Glenn stated that it was difficult to verify. All the water rights in the state, essentially, work that way. He stated that paragraph C was, once again, putting the burden on Nestle to advise that any time Aurora was exchanging the category II lease. Nestle shall ensure that Aurora provided advance notice of its intent to do so and arrangements can be made in advance. If not, Aurora will pull the category II lease out and then tell Nestle two days after the fact that they had to do it in advance. It was not likely that was something that Aurora was going to do just on a whim. It took time to put the leases together to make the diversions and to get the permission to do it. Therefore, advanced notice would not be that hard to give. They just wanted to make sure that the timing coincides. Nestle had the ability to shut down so it did not occur after the fact.

Commissioner Giese asked how A and C were different other than two. He stated that A used the word ceased when talking about the category II lease. In C it stated voluntarily. He did not like that word because it was like saying that you can or cannot. They would either cease pumping or they do not but not voluntarily do anything.

County Water Attorney Culichia stated that there was some extra verbiage that was probably not necessary.

Commissioner Giese again asked again what the difference between A and C.

County Water Counsel Culichia stated that it just amplified that it required Nestle to get Aurora to give them advanced notice so that it would happen quickly.

County Land Use Counsel Green added that along the same lines she would ask if it was a term of art or just something that after the Board discusses, they could talk about to have a distinction between the term shall cease pumping in A versus suspending pumping in C.

County Water Counsel Culichia responded no. He thought that it was a temporary thing when they were not doing Category II leases as long as the augmentation was being provided and Nestle could gear up again. Suspend was probably a better term perhaps than even cease. Shut down pumping, cease pumping. There were a lot of different ways to say it.

Chairman Holman asked if they could add that Nestle needed to notify the County in regard to using Category II leased water to A and get rid of C.

County Water Counsel Culichia replied certainly.

Commissioner Glenn asked if they were going to modify paragraph A and get rid of C.

County Water Counsel Culichia responded yes. He continued with Paragraph D. He stated that it was a suggestion or an idea that he came up with to deal with the issue of Aurora not being an applicant in the case but Nestle was. Nestle stated that Board could impose terms and conditions on them, but it was difficult to say that Aurora shall do this and Aurora shall do that. So since Nestle was willing to accept the burden of

what goes with this water, then this gives the County the ability to examine all the accounting and see how Aurora is operating. If the County believed Aurora was indirectly making up the water that they leased to Nestle through native sources, then they can step in and reopen the permit and try to impose additional terms and conditions or suspend them. It was just difficult. He really struggled with it on how to make it some what enforceable but without Aurora being here saying and you shall not do this. It was a very difficult problem. He continued stating that he was not sure if this was the best way to do it. It was just the thought that he had at the time. He was assuming that there was probably going to be some debate on some of those questions. He continued with Paragraph E. This was more or less the suggestion for Nestle that we will shut down and bare the risk that Aurora would not do that. Since Aurora cannot be told not to do that, they will bare the risk that Aurora will not. This was just an attempt to put "in some teeth" into what was said if pumping did occur during the Category II exchange in violation to one of the previous provisions that there be some penalty associated with it. We would not necessarily know how much Aurora "got away with" so this would be a credit, essentially, that we would receive to offset that. This is what Nestle, for each acre feet that they pump during a Category II Exchange, will give up, two additional acres.

Chairman Holman asked what the term on that would be, if that was just for the year.

County Water Counsel Culichia stated as an example Nestle pumped ten days, when the Category II lease was operating. There was a daily maximum of one acre foot of pumping, which we will use as a number, probably will pump less. We will assume that they pumped ten acre feet, meaning that the pumping would be suspended for thirty days or thirty acre feet of pumping. We do not really want to do it by day because they may not operate everyday, so they do not pump again until they have given up thirty acre feet.

Commissioner Glenn commented that A through C basically were designed to make sure that native water was not being used. He asked if that satisfied the concerns on Mr. Scanga's testimony concerning the drought years and cumulative effect. He felt it did and in some ways he felt it was eluding him a little bit.

County Water Counsel Culichia stated that he could understand that and he struggled with that. He stated short of flat out stating that Aurora shall deduct two hundred acre feet of water from their in basin pumping or short of taking two hundred acre feet out of any Category II Exchange to make sure that it occurred. He could not keep up with any idea of how to do it. This seemed to be a reasonable approach but certainly not the only one to address the issues by the Upper Arkansas primarily and by us earlier on. He continued to remind the Board of the first letter to the County back in February was to prevent the getting around the native water, the non-native source and allow it to be augmented by exchange. He continued short of actually saying Aurora shall not pump or shall not divert these two hundred acre feet and shall subtract two hundred additional out of the Category II Exchanges. This was what he came up with.

Commissioner Giese stated that his concern was that they would draw down their reservoir supply to one thousand acre feet and then they need a thousand acre feet. He stated that was two thousand acre feet and then you could say that they need that out of the Otero pump station, wherever, so now they are trying to call water rights to make up for that thousand acre feet. He reiterated what County Water Counsel Culichia was saying that Aurora did make up for their little reservoir or the water they have was they start leasing Category II water to make up for that depletion. They voluntarily gave up their two hundred acre feet, thousand acre feet, and now they were going to lease water from whomever to make it up. During that lease time, the applicant had to quit pumping. Basically what was being said was that the depletion, because of the lease, was made up by Category II leased water.

County Water Counsel Culichia stated that most of Aurora's water was Arkansas River water and Rocky Ford water. It was the most senior water. It was the decent water

right in the summer months but was certainly not the most senior water on the river. He stated as an example to use the thousand acre number. The thousand acre feet over five years, at least to Nestle, was not going to be what tips the balance on Aurora's being below sixty percent on March 15<sup>th</sup> with a fifty four thousand acre feet demand of yield through their entire portfolio. He did not see that thousand to tip the balance.

Commissioner Glenn thought it would induce it by that much.

County Water Counsel Culichia responded that they created a demand that they did not have before this lease.

County Land Use Counsel Green asked if E related back to A or what would become A and C.

County Water Counsel Culichia stated that was correct.

County Land Use Counsel Green stated it was like a stipulated penalty.

County Water Counsel Culichia stated that was correct.

County Land Use Counsel Green asked in their discussions were they thinking in lieu of the typical enforcement which was violation of any condition subject to enforcement. She asked if this was in lieu of or in addition to.

County Water Counsel Culichia stated that he had not thought about that.

County Land Use Counsel Green stated that was a suggestion that Nestle offered and he had said he made that up on his own.

County Water Counsel Culichia stated that he was unsure if Nestle liked it or not.

County Land Use Counsel Green stated that she was sure they loved it.

County Water Counsel Culichia continued with thirty six. This was just limiting the production wells to two at the Ruby Mountain Site. He did not go into any additional detail on the Bighorn Sites. He did have some of his previous correspondence. He stated that Rmbh-2 was the existing well that they tested at the Ruby Mountain Site. They wanted to drill one additional well to use as a back up well. The plan was to use Rmbh-2 as a production well. The previous discussion that went down into thirty seven was that the well be located within a hundred feet. Nestle Water Consultant Simms suggested two hundred feet, which is actually the state standard. It would make no difference in terms of the aquifer and its properties. He was ok with that. The key components of these two paragraphs were that there was a pumping limitation combined now. They were only pumping one well at a time. They cannot be pumping both at the same time. The Rmbh-2 will be the principal well. They wanted that because that was the well that was actually tested and there was data. Two hundred gallons a minute would be the maximum pumping rate. If two hundred gallons a minute were pumped for an entire day that would be a little bit short of an acre foot of water, with the max being one acre feet per day than sixteen point six six acre feet per month. Sixteen point six six times twelve was a little less than the two hundred and that accounts for the transit losses. Paragraph thirty seven restrictions on how the pump is set and the wells are completed are to ensure that they place their wells and their screened intervals of their wells. When you drill a well, the screened interval of the well is where there is the slotted casing portion of the well that actually produces water into the casing. They completed their production wells in such a way that they were keeping it well below the existing water table. They do that for a variety of reasons. Most of which are water quality related that they can have a spring water source. This was just to make sure that when they complete and operate their wells in the future they can be treated in the same manner that they are tested. Then there is

not an issue that they are drawing the aquifer down. For example, they put the casing in the pump at a different location and lowered the water table more than what their pump test indicated. Paragraph thirty eight was the discussion they had at the last public hearing at the Steamplant when the geo-mega people were present. The question was about the ditch that came down that intercepted the spring flows up above the hatchery springs, which are in BH1234 and then that water flows through the hatchery. This will also be the ditch and the water source that flows into "the-to-be constructed ditch" at the hatchery site. He asked the Board to remember the existing measuring floom down at the far end of the property where Nestle had measured. Dr. Kolm had previously suggested that they get some baseline measurements of the water flows between point A and point B. So we install an upper and lower floom. This is the discussion to have measurements daily and the continuous recording devices at the flooms to know what the flows are. Then we can see what is happening in the real world.

County Land Use Counsel Green asked when that would have to be installed.

County Water Counsel Culichia stated that they were both installed. He had six months of data somewhere. Both flooms were in and the recording devices were not that complicated to install. There is daily data that then gets reported monthly to the County along with the information that will come from Aurora assuming that the project goes forward. Thirty nine was the same term and condition that had been in multiple things transported over about the impacts of pumping to be constructed Wetlands. It was the same language that had been in everything from day one almost.

Chairman Holman had a question on thirty nine regarding a decrease in spring discharge at the Ruby Mountain Springs 1 2 3 and 4. He asked how there could not be a decrease.

County Water Counsel Culichia stated that it would. He stated that the question was whether it would decrease those flows to a level that impair the ability of the reconstructed Wetlands to be sustained.

Chairman Holman commented that any decrease would cause the permittee to cease pumping.

County Land Use Counsel Green added that it was because of the clause at the end.

County Water Counsel Culichia stated that it would continue to a level at or below what the reconstructed Wetlands needed to.

County Land Use Counsel Green added that the clause just needed to be moved.

County Water Counsel Culichia stated that it was intended to reflect that. He stated that obviously they were going to reduce the spring flows and the ditch flows because they were hydro logically connected. The question was we do not want to reduce them to a point where it would impair the ability of the Wetlands. He stated that would be part of the Wetlands reconstruction plan and the water needed for that. He did not go into that detail because it was part of that other term and condition that Dr. Kolm had talked about previously related to the amount of water. The Wetlands were going to be designed and constructed not to fail. The alluvium in that location within a hundred feet was essentially in contact with the surface. The depletions from the well pumping were simultaneously felt at the river. It was just like having a ditch and taking the water right out of the surface ditch. When the wells move a distance away from the stream, the depletions to the river do not happen simultaneously. There is a short term lag depending on distance and the aquifer. So the lag depletion calculations Nestle did was confirmed by Mr. Thompson and the Geo people that they were reasonable because they were close to the river. Within a few months, most of the depletions were in the same month of pumping. There was a small percentage that carries over for a period of time. A few percentages each month after so if you shut

down the well there is going to be a period of time where the river still fills it and lag depletions. One of the traditional ways in water court, in making up lag depletion, is just to call it good at the end and just make a slug release from storage. We wanted to make sure that they continued to replace the water in the exact time placement amount as they actually take out but at the end the five percent number was just a small number. The five percent number can be made in a slug release right at the end. This was a pretty reasonable term to meet. Then paragraph forty two also had been discussed quite a bit. Nestle stated that the primary source of water to the aquifer, the physical sources of water to this alluvial fan aquifer, came from Trout Creek, from precipitation. We want to make sure that they did not dry up irrigated land. Somehow recharge pits up above need to be made and use that water as a physical source. Not as an augmentation water source, but as a physical source of the aquifer to keep the levels high. He stated that was what that term and condition related to.

County Land Use Counsel Green asked if the Board, other than what was just discussed on those proposed conditions where they discussed about making the language internally consistent had any other specific direction. She knew they had talked about combining paragraphs A and C. She reiterated that they had talked about information going to the staff. She did not get a clear sense of whether or not the Board wanted the reporting obligation to come to them or County Development Services Director Reimer or the County Water Rights People.

Chairman Holman felt that it should obviously go to the Water Counsel and most likely the engineers as well. Whether or not it needed additional step to come through County Development Services Director Reimer and to the Board, he was unsure.

County Water Counsel Culichia stated that he added a sentence to paragraph ten on administrative costs. The last sentence of that paragraph ten stated that the permittee shall reimburse the County for legal and engineering expenses incurred in administering, reviewing, and enforcing the permit and any terms and conditions. It is probably stated in other places but he just added that to make sure that it covered this review of the accountings that were going to be required.

Chairman Holman felt that it did need to come through their office and through County Development Services Director Reimer but not necessarily him being the primary reviewer.

County Land Use Counsel Green stated that then County Development Services Director Reimer would get it to whoever else needed it.

Chairman Holman thought that it did need to go to counsel as well.

Chairman Holman called for a recess at 10:29 a.m.

Chairman Holman reconvened the meeting at 10:45 a.m.

Chairman Holman stated with the permission of the other commissioners, he requested to move to paragraph forty seven to the last page. He then asked for thoughts.

Commissioner Glenn commented that he had not read it yet and was not sure that he could read it in a short period of time. The Board allowed time to read through it.

Commissioner Giese stated that his concern with forty seven was that the amount of money. He felt that the amount was fifty thousand dollars. His reasoning was based on through the permit process, it seemed that some of the consultants and everything are very expensive. They were at about one hundred forty five thousand dollars plus or minus. It just seemed to him to have a fund of only fifty thousand, which by what he had read if it drops below twenty five then it was being reimbursed. It just seemed to be, one of the issues that this fund was for in case of an emergency. The two big

things were consultants and possible legal. He did not think fifty thousand was enough. His number was more about two hundred thousand. He guessed the word was sustainability. He continued to state that if in fact if they we would get into a legal situation with the applicant, they would burn up fifty thousand in a heartbeat. If they were in a dispute, he did not see the applicant giving them anymore money to sue them. Therefore, that fund has to be sizeable enough so they could be "sustainable" in case of any legal issues, where two hundred thousand might not be enough. At least if they were spending that money, it was not the County's money. The cost to the county was one of his major concerns. There should not be any cost to the taxpayers or the County. He felt that the number needed to be bigger. He stated he was saying two hundred thousand for a starting point.

Commissioner Glenn agreed with Commissioner Giese. He stated that one of his concerns was that he did not see where the mitigation fund actually specified the legal costs. He stated maybe it did, but he had browsed over it too quickly. He thought they needed to be more specific on that as well. He thought that there were three different opportunities that the County may be sued or get into a legal situation for. One was where the County would have to sue Nestle under a permit violation or something along that line. Another was if Nestle sued the County over a dispute on a permit violation. The third one would be if a third party sued the County over an issue related to Nestles. He felt that all three of these were very real and had the potential of being very costly to the County. He wanted to make sure that the County covered all of those situations in the event that there was litigation. He told Commissioner Giese that he was not sure if two hundred thousand dollars was even the right number, but he knew that you go through two hundred thousand dollars pretty quick in a legal litigation.

County Land Use Counsel Green commented to Chairman Holman that he was getting to the root of one of the policy questions to the Board. They had a place holder in nine and ten where they discussed permit enforcement costs and water litigation administration costs. These are set up right now as stand alum provisions where if the permit did not already have the expertise to evaluate, the permittee shall be responsible for reasonable costs associated with consultants. In the water administration litigation, it went into much more detail about how all that will happen and how that will be paid. Reimbursement will be required. These are stand alone right now and do not relate back at all to this mitigation because they were not sure whether in the Board's thinking, when this idea of mitigation first came up, whether or not all these things would go in "this pot or not". She needed to understand how the Board was thinking and they could make the changes on the basis of the discussion.

Chairman Holman commented that some of these items in the monitoring and these things were going to be ongoing. They did not belong in the mitigation fund.

Commissioner Glenn commented in that event, there would have to be a separate mitigation fund set up for litigation and things of that nature. He thought that it was difficult to define those within the paragraphs of what they might be faced with. He would rather have an all inclusive umbrella that would include those legal.

Chairman Holman stated his point was if they had counsel to review the pumping and Aurora's use on a monthly basis, it appeared to him that Nestle direct pay or something like that and then use the mitigation fund for unexpected things that come up.

County Land Use Counsel stated that some of these things were already set up and not for any reason other than they did not know what to do. Some of these, like permit condition review costs, was now set up where the County would send a bill to the permittee to be reimbursed as opposed to an ongoing evergreen fund that can be dipped into. She was unsure which things the Board wanted under this umbrella of the evergreen fund versus which things they are fine with like sending a bill and getting paid in forty five days.



Commissioner Giese stated his question was with eight, nine, and ten when he was reading through it whether it was separate from the mitigation fund or part of the mitigation fund. Before he could say yes or no, besides saying that those costs talk about monitoring, he could understand a direct billing type of situation and if not paid then it comes out of the mitigation. When you get down to litigation and administrative costs or those types of things then, he felt that had to come out of the mitigation fund. He thought that the question or statement was what went where and how. He stated that was where he would define that but it needed to be better defined of what was going to come out of that. He agreed with Commissioner Glenn. He thought that the last paragraph on page two did not really cover any legal action in those three things.

County Land Use Counsel Green stated that right now it was set up so that there was a section called Eligible Impacts. There was a list that was not exhausted but illustrative. This was Jean Townsend's recommendation that it be impacts that directly or primarily attributable to the approval, development, or ongoing operation of the project and that the eligibility will be determined by the Board. In other words it is set up so that the Board does not have to make a sweeping decision at every possible thing that might be directly or primarily attributable to the project but the Board does bind themselves to make sure that it is directly or primarily attributable. Therefore, it would be the constraint on their discretion. The way that it is set up now, eligibility is determined on a case by case basis. So there is an illustrative list of categories of impact costs that would fall. Now there are specialists that include legal or technical counsel and specialist for legal action. It is in here as an example but it is also set up so that the Board can see it, think about it and decide how they want to do it.

Chairman Holman commented that he thought that it was a planned expense. It should be a direct bill that we pay and get reimbursed or however that may work. He stated that everything else probably falls into mitigation because it is unexpected.

Commissioner Glenn stated as a specific question on the issue, if they were to hire consultants and those consultants came in, reviewed this and then the County fronts the money and maybe it was a substantial amount of money for certain things and then it takes the County forty five days, sixty or whatever, one hundred twenty days to collect, he thought they needed accrued interest on those dollars that the County fronted when they are reimbursed.

County Land Use Counsel Green stated that if there was a fund in place, the interest would have to accrue to that fund to the benefit of whoever funds the fund.

County Attorney Davis commented that the County could have a fund that went to those types of costs too as opposed to incurring the risk that the money did not get paid within forty five days. She recommended that they have that as opposed to having the applicant pay the consultant directly which she was uncomfortable with.

Chairman Holman commented that he also was uncomfortable.

County Land Use Counsel Green commented that they were talking about two kinds of "pots". One was what they described as ongoing that they knew in advance of County Water Counsel Culichia's review of the water reports. The other "pot" would be for the unexpected. She stated the other piece related back to their consultant THK and his presentations during the hearing that this project would bring in more than enough money to reimburse the county and local governments in Chaffee County for cost of service. In fact the initial reports there would be zero costs of service. There would never be any use to serve any of the buildings or anything that had to happen with Nestle. It was a pretty firm statement that they were optimistic that the County would be paid in taxes that will end up being a benefit to the County. The other part of Jean Townsend's reasoning was that there needed to be dispute on this. There was a lot of unknowns. There was a lot of evidence on both sides. She asked why did we not "cut to the chase" and say ok. If in fact that is true, we do not dip into the fund and get our money back with interest. She continued to say that if the Board was wrong and the

money came in each month in property tax is different from what they thought and in fact the County did have to provide services or any of the other local governments like ambulance districts, then that fund would be used for that purpose. So that was also part of the thinking here. She asked the Board if that was what they were thinking.

Commissioner Giese reiterated what he thought County Land Use Counsel Green stated. Money that was collected tax wisely could be used to mitigate as expenses to monitor and/or consultants for this permit.

County Land Use Counsel Green stated no, only for services because taxes go to service delivery by the County of whatever county services might be, Social Services or any governmental service. What Ms Townsend was proposing was the Board would look at the tax year and figure out what Nestle would be bringing in and then keep track what costs the County would incur to serve Nestle and net that out. If there was a deficit, the fund would be used to make the County whole. She stated that Ms Townsend was also thinking that it would also be for other service providers in the County, not just the county governmental services, but if there were other service providers, who responds to an accident of a Nestle truck, was one of the things on the record that people talked about. If that was the Board's thinking, then they need to "nail down" what other service providers they are talking about and how would they determine costs that were directly attributable to Nestle as opposed to costs that are generally spread across the County that are not directly attributable to Nestle.

Commissioner Giese added that his problem with that was they would have to hire another three people to keep track of that. Every person who pays taxes gets services. What they are saying is they are going to deduct the applicant's taxes for some of the services that they might use.

County Land Use Counsel Green stated no that Ms Townsend was saying that if in fact they are wrong and it is pretty easy. Fiscal impact consultants, all the time, figure out cost for police response, which was how people develop impact fees and that system is easily developed. What Ms Townsend stated was if in fact nine hundred dollars a month or a year or whatever it was in property taxes did not cover through a fiscal impact analysis shows were incurred, then they owe the County money because they stated on the record that they were not going to cost the County any money. It was not supposed to increase the cost of any segment of the economy which included government segment.

Commissioner Giese said that he needed to be more specific. If something major happens, construction, police, fire and ambulance, they all cost. Now there is a cost, x number of thousands of amount of dollars. Through the process, their tax collection for the year would not pay for that one incident. Therefore, they could dip into the mitigation fund to offset that cost.

County Land Use Counsel Green stated that was the proposal. She stated that figuring the costs was not that hard to do. It would be directly attributable to Nestle. She did not think that there could be any language in the world to resolve that. This is where it has to come into the discretion of the Board. The term directly attributable is used throughout many different legal arenas. In the end, either a judge or an administrative body makes that call.

Chairman Holman stated that he could define direct and indirect. He was unsure if a judge would define it the same way that he would.

County Land Use Counsel Green told the Board that it is theirs to define. This was just a proposal to the Board. She stated right now it stated eligible costs. The mitigation fund would be used to reimburse local governments including the County and others that the County designated, for cost incurred and direct relationships with project impacts that were not directly reimbursed by Nestle Waters and not indirectly reimbursed through tax or fees paid by Nestle Waters. Some volunteer fire

departments in some places send a bill when they respond. If that was the case and there was a fire that it was directly attributable to a Nestle structure, the way that this was proposed, dip into the mitigation fund because they would have been sent a bill and already paid it. It was for anything over and above what they paid for in fees, direct billing and tax revenue. There was a proposal for quarterly reports prepared by the fund manager.

Chairman Holman asked if they were still looking at one fund to cover everything or were they looking at a specific fund the potential of legal challenges. He then asked if there would be another fund for just the everyday run of the mill whatever or were they going to determine that.

County Land Use Counsel Green stated that it was completely up to the Board to develop it the way they wanted to. She knew that Nestle would like to see a whole process where they come in and get to have a hearing or a discussion or submit information or evidence about whether or not it was an eligible expenditure. This was not drafted that way. This was drafted with the Board retaining the discretion on this issue. She had not thought about the "two pot idea" until just now. She stated beyond this particular one, it would make sense for all of them to go back to the drawing board and really think through whether there was a need to distinguish between "pots" or was just "one pot" fine, as long as we understand what was an eligible cost.

Chairman Holman thought that there were two different things. He stated that you have one that was not going to have a significant "pot" if you will. Perhaps maybe this could be an extraordinary situation, but he would foresee that it probably would not be. Then on the other hand you have one that had the ability to have a very significant dollar amount attached to it.

County Land Use Counsel Green asked if the Board wanted a permit holder for a second. She felt it would be very difficult for her to have a million dollars always sitting in Chaffee County for unexpected occurrences. If she was speaking for IBM, she would be better able to convince IBM directors that she needed a fund of at least two hundred thousand dollars for these certain things, but if she went to them and stated they needed to fund it for a million dollars because there might be lots of litigation, she thought that would be very difficult. Then she stated not to say that there would not be this obligation that they pay bills submitted to them for extraordinary things that they could not funded in advance. Thinking in terms of almost financial security, it is very difficult to get financial security for someone that is completely hypothetical and unknown. When it is ongoing and fairly predictable, it is easier. Maybe they can think that way. Also it would certainly make sense if a permit holder were to accept a permit in which they assumed an obligation to pay monthly bills or invoice not matter what that would be, water litigation, mitigation, or whatever. If they did not pay within forty five days, their operations are suspended or it would be deemed a permit violation. There are different ways of protecting yourselves.

Commissioner Giese stated that the issue was that the one who could cost us the most money was going to stop pumping and that was what they were arguing. He stated that County Land Use Counsel Green was saying if they do not pay in forty five days, they need to stop pumping. If they have not stopped, they need to because of a violation. This is where you get into, other than shutting off the electricity, a problem. If in the mitigation fund, there are the unexpected costs, and then the costs that are outlined, the Board knows what will be the costs. He did not expect any of these or want litigation or whatever that is unexpected. Things like the monitoring and those issues were known costs that are part of the permit. They could do it just like they talked about it. On those monthly expected costs, just bill invoices sent and paid and go on, because they know that costs the operation.

Commissioner Glenn thought it could work either way. He thought the dollar amount was where you really wind up. He asked what was a reasonable dollar amount to cover not only the known but the unknown.

Commissioner Giese stated that they had agreed that they needed to have more work on this. He reiterated what County Land Use Counsel Green had stated previously about interest and that the interest would come back to a fund. He asked if they could designate that interest to go someplace else.

County Attorney Davis thought that it was going to depend on what he had in mind.

County Land Use Counsel Green stated on the one hand, an applicant accepts the permit with conditions, the money could go anywhere. On the other hand, to be reasonable, and she thought that was the standard that they were talking about under their regulations, which were reasonable conditions, the money would have to continue to relate to the standard which was intended to help achieve. The standard here was being no significant impact to any segment of the economy and not causing the County any costs for services that were not reimbursed. When looked at it against a standard or criterion, she thought the interest would have to relate back.

County Attorney Davis stated that along those lines she thought that they could keep the interest in the funds till the end of the permit period.

County Land Use Counsel Green commented that they would keep working through this and try to develop more precision with the help of the discussion today.

Chairman Holman referred back to page one. He asked County Land Use Counsel Green to lead them.

County Land Use Counsel Green asked if the Board would prefer to go to the ones that were more policy related and relate directly back rather than the administrative ones.

Chairman Holman stated that he did not have a problem with the administrative ones. They moved to page fourteen.

County Land Use Counsel Green asked County Development Services Director Reimer if he wanted to talk about Big Horn Springs.

County Development Services Director Reimer stated that she could lead the discussion and he would add additions if necessary.

County Land Use Counsel Green stated that part of the application was a condition that pertained to what the applicant had offered. Part of the application had been these land management plans. Different drafts of them had been received over the course of the process, with April 30<sup>th</sup> being the most recent. These were in the column Benefits to the County. In terms of the visual impacts of the project, part of the testimony was, "we are going to make this a better place than it was when we came in". One of the ways, they were going to do that was through the land management plans. They are going to be stewards to the land. It is going to be visually better. It also had a relationship to others of your standards like protection of terrestrial plants and animals. The idea of habitat and the idea of wildlife movement corridors are in all of your wildlife regulations. Just general benefits to the ecology environments and the critters that live in that environment. There have been a couple drafts that have come to this particular condition the way that it was drafted now that would require Nestle to come in and sit down with County Development Services Director Reimer to figure what else, if anything needed to be done to finalize this plan to obtain the approval from the County. It is set up with a trigger and it is set up with a County review. It lists some of the plan components which in fact came from what the applicant was offering the planned components to be. She stated the main policy decisions here that she saw were whether the whole discussion was the timing for the discussion of the plan, which right now was thirty days from the effective date of the permit. She stated that the term effective date would be defined, but typically it was thirty days from the day that the permit was issued. The Board could have these discussions at the county staff

level or they could finalize the plan before they begin the operation. This was the Board's policy choice.

Commissioner Glenn asked if County Land Use Counsel Green was talking about each commissioner individually reading it or seeing it in a public forum which they could debate the issue.

County Land Use Counsel Green stated that was what she was asking. She asked if they wanted to do it in a public forum where they would actually make the final decision whether or not the plan was ready to go or whether they wanted to delegate that to the staff to inform them to keep them in the loop but not have a public hearing. She asked County Attorney Davis if she missed anything.

County Attorney Davis responded no.

Chairman Holman stated he was ok either way.

Commissioner Giese stated that he could see the benefit.

Commissioner Glenn stated he would like to think about it for awhile.

Commissioner Giese stated that he was not against public input for those types of things and it needed to be right. Some of these issues whether this was the best plan or not the best plan, whose opinion or what opinion, but he did have a concern about that as County Commissioners, they needed to have the final say of what they liked and what they thought the plans should and should not be.

County Attorney Davis stated that there were three options. It would be delegated to staff, staff would provide the Board copies and the Board could individually make comments back to staff of concerns they might have. There would be no opportunity for the Board to discuss it as a group as that would be outside the hearing process. The second option would be the Board could discuss it and then get feedback to staff in a public forum. This did not necessarily mean that the Board had to take public or applicant feedback on the plan or concerns on the plan. It would be more deliberating, what they were doing right now on the document amongst themselves in public. The third option was what the Board mentioned earlier, opening that whole process up entirely, but she thought that it was possible for the Board to discuss the plan with the group without opening it up to the applicant or the public comment.

County Land Use Counsel Green pointed out that these plans had been part of the record and available for the public to comment on for months and months and months. It has also been reviewed by the county experts. She understood from County Development Services Director Reimer that they were really close to finalizing. It was not as if there had not been a plan in place and there was something new coming in. Any finalization of the plan, from what she understood, would be fairly minor changes to what had already been proposed. She stated to take that into consideration when determining how to do this. The other issue was that it would require this one to move forward to be finalized before operation of the project as a whole. When that was first discussed, Big Horn Springs was part of pumping, but that was no longer going to be where they would be getting water from. Taking that into account, for example, one of your enforcement techniques would always be to require them to stop pumping. They were not pumping on the Big Horn Springs parcel at all. You want to make sure that you have a Big Horn Springs plan, even though they were not going to be operating on that parcel. The way that it was proposed was that County Development Services Director Reimer would make the decision. Of course, every staff decision, a staff person can always elevate it to the Board, always. Even if it stated to submit to a staff person, they may choose not to deal with it, go to the Board and ask the Board to consider it.

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Commissioner Giese added or if they decide that there was an impact to make the decision.

County Land Use Counsel Green stated yes and that would be one of the situations.

Commissioner Giese stated that in a situation where County Development Services Director Reimer would say they were stuck, they could take on the three possibilities from there.

County Land Use Counsel Green gave an example of a staff member leaving. She stated as an example County Development Services Director Reimer left tomorrow, a completely different kind of staff comes in late and says that they do not know anything about this application and was not part of this and wanted to see it redone. An applicant or permit holder could always ask the Board to take it up. This was always good on the background behind any decision the Board makes.

Chairman Holman asked if that was all she needed.

County Land Use Counsel Green responded yes but she was unsure if they had given different direction on this one. It sounded like the Board was still thinking about it. It was now worded where it was going to the staff, which would probably be alright for now, but the Board would need to talk more about it later. She asked the Board if there was anything in there right now that they would want to change.

Chairman Holman stated that he did not think so.

County Land Use Counsel Green stated maybe that a better way to word it was they were just wanting to know if they were even close. She was not asking them to approve or not approve a condition. The Ruby Mountain Land Management Plan was exactly the same kind of issue, except this was on property where they would be pumping. It was worded much the same way. If they saw any reason that they ought to be different, then they would leave them the way they were as they continue to think about them. The hatchery restoration was a very long condition. There were a lot of unknowns in the hatchery restoration project. This was another offer that was made by the applicant. The applicant stated that part of the benefit to the County when you have that criterion, the benefits outweigh the losses. This was in the benefit column. It was something that they proposed from the beginning. It also went to the visual impacts, the wildlife habitat and many other criteria. This was sort of a mitigating factor on the plus side of the column as they presented their material columns to you. They did have some discussions with the applicant about the hatchery restoration. This was an attempt to try and set it up for the Board to have time periods. You know when it will happen but you also are not putting a permit holder in a situation of promising to accomplish things by certain time frames. Because of federal and state permits, they cannot. This was an attempt to try and resolve that issue and be reasonable but also make sure that you will get hatchery restoration. Right now there was quite a bit of time. Instead of thirty days, like the other plan, there are sixty days to get approval from the County, a final plan. This was the same sort of thing. There have been plans for the Board to look at. This one was the least well developed because of the federal pieces of it. The standard that they suggested was to restore conditions to a more natural state. This was always something that had been presented to the Board as a benefit associated with the hatchery plan. Then there was this whole idea about the educational institutional access during restoration planning that was also presented as a benefit. The plan that they are asking for would include a list of permits that are required. It would also require the permittee to initiate and pursue the plan within six months of approval by the County. Pursuing the plan would mean starting the permit process. There are things that they might need to do to get a permit. It did not mean building the structures. It meant pursuing to implement the plan. If she were submitting a plan to the County, she would say that she agreed that within six months, the first step she would take would be to do the work for her core of engineer permit or obtain her nationwide. This was the intent to accomplish, because the Board would not even

know for sure whether federal or state permits were even needed. Once there was a permit in place, it would require them to complete the plan and fully implement the plan in three years from the last permit to accomplish it. In the case that a permit was not needed, she felt that they had been updated already. Then they would complete it in accordance of a time table that they gave to the staff. It would have that eventuality already in it unless they get an extension. It had several different targets to try to give a permit holder enough leeway to be reasonable but to give the Board an idea of where they were going and to have milestones that could be looked at. On this particular one, so long as there was a three year period after permit and milestones of when they needed to begin, she asked if the Board had any objection to staff working a little more closely with the applicant to refine time tables and triggers within this.

Chairman Holman responded no.

County Land Use Counsel Green stated that the grand water monitoring and mitigation, was drafted for the trigger here, rather than a certain number of days after the effective date of the permit. This was saying that prior to any pumping, there would be a final grand water monitoring and mitigation plan. There had been plans. It was just a matter of getting approval. Specifically staff was on this one, because it seemed to make the most sense here. If the Board was ok with that, they would leave it at the staff level. This would include County Development Services Director Reimer using whoever he needed in terms with staff, outside consultants or experts. The idea was to determine whether the project was causing any negative impact to water resources. The mitigation would be implemented to avoid degradation. What she had seen often was that plans submitted to counties had a lot of monitoring requirements, but they were short on the "so what". She was not that was true here, because she had no idea, but what they would be looking for the "so what" in the plan. It was not in the County's interest to have a report monthly where the ground water was monitored. What are the kinds of things that the Board would need to look at that would be indicators of a problem and then what steps would be immediately implemented if there was a problem. When this kind of plan was reviewed and finalized by the staff, this would be what the staff would be looking for. Regarding the Wetlands Monitoring and Mitigation, this was tied to the recommendations in the Colorado National Heritage Program letter of April 14<sup>th</sup>. There were a couple issues here that she felt could be worked out in a course of a plan being finalized for the Wetlands Monitoring and Mitigation. One of the issues she saw was the April 14<sup>th</sup> letter drafted for Big Horn Springs, which was taken off the table. It had some very specific recommendations that pertained to Big Horn Springs. There was also conflicting testimony on the record about the absence of Big Horn Springs, whether the pumping would cause impacts to Wetlands. Rather than trying to figure all that out, the idea here, with the way that this was drafted, was the approved plan signed off by the County and its Wetlands expert. It may be that the Wetlands expert stated that once Bighorn was pulled off the table, it is or not an issue. This was why it was drafted this way. Regarding pumping rates, she asked Mr. Culichia if he wanted to talk about them.

County Water Counsel Culichia stated that he not noticed that one before. It was duplicative to what he had drafted in the more specific terms.

County Land Use Counsel Green stated that the idea there was all of the assumptions on water resource impacts of any kind including habitat would go back to a certain pumping rate.

County Water Counsel Culichia stated that maybe he could just move this as preface language to some of the more specific water terms.

County Land Use Counsel Green stated that was fine. If that were to change, then that would trigger what we have been short handing as a reopener, because everything was placed on these assumptions. The endowment was another thing that the applicant on its own initiative proposed, but then it was taken into account by the Commissioners during their deliberations when they looked at the benefits and costs



of the project. This was an attempt to hold the applicant to that promise because again not knowing in the case of people changing. There had to be some way to measure the progress here. Currently it was open ended as to when this had to be funded. She asked for feedback and a timeframe for this.

Commissioner Giese stated that his opinion was approval if approved.

County Land Use Counsel asked how many days after the effective date.

Commissioner Giese stated that just so many days like the other things thirty or sixty days.

Chairman Holman agreed with Commissioner Giese.

Commissioner Glenn agreed with Chairman Holman and Commissioner Giese.

Commissioner Giese asked focusing on Chaffee County sustainability, what did that mean. He had no problem with that but there needed to be sustainability.

Commissioner Glenn stated that it needed a little more refining and defining.

Commissioner Giese stated that they were talking about resources and what.

County Land Use Counsel Green stated that the proposals by the applicant threaded through the record on this fund and how it might be used. She was thinking if the Board agreed, they might sit down with the applicant, discuss what the Board's latest thinking was and then come back to the Board with it spelled out better.

Commissioner Giese said that he was assuming with the 501C, there was a complete Board of Directors and the Board was out of the process.

County Land Use Counsel Green stated that was the way this was proposed.

Commissioner Giese stated that this came back to the question he had earlier about the interest whether or not it was proper or reasonable.

County Land Use Counsel Green stated the only issue she saw was that the mitigation fund as currently hypothesized going to make up shortfalls where this was an extra. If the interest incurring was not needed for the purposes of the mitigation fund, she could see that as being completely reasonable.

Commissioner Giese stated that his understanding of the mitigation fund was that there was x number of dollars. If you were not going to accrue interest on it, it meant that it was going to continue to grow. Someone could say wait a second and you said two hundred thousand, five hundred million and whatever it was. Now it was plus three dollars and fifty five cents. The Board did not have to contribute. He suggested taking fund and using it for something positive.

County Land Use Counsel Green stated that it was just for a different purpose. She would think about it and get back to the Board. It would be up to the applicant to define that.

Commissioner Giese understood that.

County Land Use Counsel Green stated that some of the information on the record indicated that the Board was interested in environmental and education. The Board expressed during the hearing some boundaries on that.

Chairman Holman stated also conservation.

County Land Use Counsel Green stated as opposed to what they used to call a home for unwed mothers in the olden days. She asked County Development Service Director Reimer to take over on the access easements.

County Development Service Director Reimer stated that it was consistent with what was in the application. Simply prior to any construction, the applicant or permittee shall have in place any access permit required to work in the County right away to the various parcels. Also ditch crossing agreements and other easements and licenses as necessary across other properties such as Colorado Department of Corrections, Union Pacific, and Chaffee County lands outside of the County right away, specifically the parcel that went along the river near Johnson's Village. Number twenty two was related to wildlife friendly fencing along County Road 300. He stated that there was some fencing.

Chairman Holman interrupted him to state that was not what twenty one said.

County Development Service Director Reimer stated that twenty one was the right away. He continued on twenty two about the wildlife friendly fencing. The applicant had already indicated the desire for wildlife friendly perimeter fencing. Twenty two essentially set a time frame for removal for some of the existing fencing and replacement of that fencing with new wildlife friendly fencing along the newly dedicated right away boundary rather than the prime locations. He continued with twenty three regarding river wade fishing on the Bighorn and Hagen Parcels. This easement would be dedicated to the Division of Wildlife on both the Bighorn and Ruby Mountain Parcels.

County Land Use Counsel Green added that some of the applicants' materials, as she recalled reviewing, talked about a license as opposed to an easement. She was unsure whether the County had a preference on that or if they needed to discuss that.

Chairman Holman asked to first of all to define the difference between a license and an easement. Then he would comment.

County Land Use Counsel Green stated that a license was a privilege.

County Development Services Director Reimer stated that an easement was a grant, not in fee but normally an irrevocable grant of a property interest. A license technically was a revocable permission. A license can be drafted in such a way that has all kinds of terms and conditions, but technically a license was a much lesser interest in real estate. It was generally revocable by the grantee or the grantor and was a significantly less property interest than an easement.

County Land Use Counsel Green stated that this particular element related back to the comp plan objectives. One of those was to maintain existing public access. There was another guiding objective to provide access to public lands and river stream corridors. That was how it emerged in that discussion.

Chairman Holman stated that he was certain that his preference would be an easement.

County Land Use Counsel Green added that it was still limited to river wade fishing. It was not just a general.

County Development Services Director Reimer continued with number twenty four, which was a discussion with the Board. It was the July 1<sup>st</sup> deliberations regarding fishing access. The permittee shall work with DOW to establish parking areas and fishing access easement over the Big Horn Parcel at appropriate locations. This related back to the comprehensive plan.

Chairman Holman commented that he wanted it worded a little different because when he read that the permittee shall work with DOW to establish parking areas and fishing, it did not sound too definitive to him. He would prefer for it to state that the permittee shall establish parking areas and fishing access easements in consultation with the DOW, or something to that affect.

County Land Use Counsel Green commented that there was no time frame on this either. They did not have a sense for that.

Commissioner Giese commented that if they were going to have river wade fishing within thirty days, it was hard to get into the river if there was no parking.

Chairman Holman commented that there needed to be some time to coordinate with the DOW and get that done. He thought that perhaps thirty days was too short on both of them, perhaps. He felt that they should look at ninety days or more.

County Land Use Counsel Green stated that what they could do was pick a number that they were comfortable with, like the ninety, but make sure that it was very clear that a permit holder would be able to come back and demonstrate to the staff that it was just not possible.

Chairman Holman agreed that it could take some time. He did think that it was really reasonable to put a time frame on it with the cushion. If the entities were overwhelmed and could not get to it, then they could come back and get the approval approved.

County Land Use Counsel Green commented that something like this condition with a time frame was subject to extension by a request in writing from the applicant. She asked if those were the sorts of things that as a policy matter, they wanted to come before them to decide in a regular meeting or something that would be decided at the discretion of the staff to determine.

Commissioner Glenn commented that he would leave it with the staff.

Chairman Holman agreed.

County Land Use Counsel Green stated she would discuss the conservation easement. The applicant again had talked about a conservation easement. The initial drafts of the easement application and the initial correspondence were very clear that it was going to be voluntary, but the difficulty came about when the applicant also claimed credit for the benefit to the County of having it land conserved at which of course was a huge benefit. There was always this tension reflected in County Development Services Director Reimer's notes and staff reports. She asked if it was completely voluntary and no knowing if that will ever happen, how could it be counted as a benefit. It was drafted as an attempt to get around that. She believed that from the record most of the concern that the applicant had on a conservation easement issue was the ability to get the appropriate tax credits and other benefits that came from someone who put a conservation easement in place. If it was a regulatory requirement, you do not get that benefit. There was certainly no reason why the County would not want a permit holder to be able to benefit from a conservation easement as they would for any person in the community. You want them to be able to take advantage of whatever might be left of those programs. The wording here was an attempt to try to get around any tax or other restrictions that say, "Sorry. If it was mandatory, you do not get it". It stated throughout that it was all voluntary, but now it was part of the project. She stated that it would be like her saying "Ok. I do not want you to impose a condition on me. Your regulations do not require that I put in a conservation easement, but the project that we are looking at is going to have one." The challenge was to try and figure out how to make sure that you know something that they say that they are going to do voluntarily will happen. The idea was to make that part mandatory as opposed to the conservation easement being mandatory.

Chairman Holman commented that the description was clear but not sure about the wording.

County Land Use Counsel Green continued that she wanted to work more on this with people who do this as a business. Regarding the conservation easement issue, as long as they were comfortable with that approach, they could work on the words.

County Development Service Director Reimer stated that twenty six, twenty seven and twenty eight were all discussed during the special permits process. The applicant essentially agreed to each of these with some minor changes, over the course of the hearings. First one was related to pipe line construction. The permittee shall submit to the County executed road access permits to construct the right away. Easement and right away dedications and licenses pertinent to the pipeline, in addition executed ditch crossing agreements and comply with archeological constructional requirements. Again all of that had been more or less discussed throughout the course of this. Twenty seven was very similar. Again prior to construction of any building permits for the lode station or well houses the permittee shall obtain demolition building and other permits required for each structure. This was actually a little bit redundant because that was what was required under the building code, specifically with the demolition permits. Twenty eight construction conditions imposed as part of the Special Land Use Permit since the Board had not yet done any deliberations on the Special Land Use Permit. As a reminder, he stated that the County Commissioners had a number of recommendations related to the construction hours primarily related to the directional drilling under the Arkansas River near Johnson's Village do to its proximity to some of the residential structures on the other side of the river. There were also considerations on keeping the county roads open during construction and a few other things. They could go through more details when they review the Special Land Use Permits.

County Land Use Counsel Green continued with twenty nine, local construction jobs. This began with THK report from the applicant's consultants about the benefits to the County. One of his promises was to hire local firms. She thought that it may have been in earlier submittals as well and some of the application materials. This was discussed. There was a concern about the work related to tank fabrication directional drilling. The Board had tried to exclude that from the promise to contract with local firms for a project related construction. The idea of what locals had come up with was what some of them had come up and testified on. There was a discussion as to what was local. She would try to say what local was. The idea was that you would start with county residents. If you cannot find any county residents then you can expand to a twenty five mile radius of the project site.

Chairman Holman asked if that was inclusive of businesses. He asked if residents encompass businesses.

County Land Use Counsel Green thought that the word resident was probably the wrong word.

Chairman Holman stated that she was talking about two things, hiring local workers and hiring local contractors or local lumber yards to provide material or whatever. He felt that there were residents as well as businesses.

Commissioner Giese commented on the twenty five mile radius. When it was stated Chaffee County, it pretty much included twenty five miles.

Chairman Holman stated that there were firms in Western Fremont County, electricians and things like who almost work exclusively in Chaffee County and buy their goods in Chaffee County. The only thing that they did not do was pay property tax in Chaffee County. He thought he would at least try to include some of those people. They did hire local workers as well.

Commissioner Giese asked Chairman Holman if he was saying twenty five miles from Chaffee County not from the project site.

Chairman Holman responded that was correct.

Commissioner Glenn stated that he had a question about that. To the extent that workers were available in Chaffee County, who made that determination and based on what criteria and in what time frame.

County Land Use Counsel Green felt that this was set up was that you would have a report that would come from a permit holder talking about what their efforts were. She stated that you would have to leave it at that. Good faith assumed and talking about what their efforts were. There was a lot of good faith assumed in this kind of condition. She felt for the Board or the County to try and get into micromanaging in this particular condition would be very difficult.

Chairman Holman also felt that it was a very important piece of this puzzle. If there was a report for the Board stated that they went out and looked at couple of these firms, these did not have what was needed. Therefore, we satisfied the criteria and we have a contracting firm from Denver here.

County Land Use Counsel Green felt that this was one that would make sense since it was something that the applicant proposed all along, assuming that they hear the struggle that we have had with this. There would be some proposal as to exactly how they would report and how would make this happen.

Chairman Holman stated that he just would like a little more than to the "extent".

County Land Use Counsel Green responded yes.

Commissioner Glenn stated that project materials and supplies shall be purchased locally and future service contracts shall be with local firms. He then asked if that included future service and material contracts. He wanted to make sure that we were doing business with local hardware stores, local lumber yards and local folks. He stated to just include it.

County Land Use Counsel Green stated that it was a similar issue with the local drivers. There was a lot of testimony about this. There was a letter from West Company Express to the County dated April 14<sup>th</sup>, 2009 where they stated they would use fifty percent of drivers from Chaffee County but again she thought that there was also a proposal along the way and conditions where if that was not possible, they would offer training or apprenticeship and programs for locals. Once again it was going to require documentation and reporting of some kind. We understand what best efforts mean and were able to say yes you did make best efforts or not. It was the same kind of issues on this one.

Commissioner Glenn stated that certainly if there were seventy five percent available from Chaffee County, he would like to see seventy five percent hired from Chaffee County rather than cutting it off at fifty and getting the other fifty from Denver.

County Land Use Counsel Green stated that they could work on that.

Commissioner Giese stated that he knew that this was kind of "nit picking". Let us say West Coast Express did not become a contractor two years from now.

County Land Use Counsel Green stated that they just tied it with that because that was where the representation was made.

Chairman Holman thought that the first sentence in there covered that, he hoped. He felt that over time, even if it was fifty percent to start with, we could reach one hundred percent level pretty easily.

County Land Use Counsel Green stated that they were back to water and to go to forty three. She stated that we could do away with one pretty quickly. It did not raise any huge policy considerations. Some of the materials on the record from the applicant, they wanted to make sure that it was clear that they were not intending to pay for the County's lobbying. They would hire their lobbyists and the County would hire theirs. Both of them would work together. She asked if that was their understanding.

County Development Services Director Reimer continued with forty four. He stated that forty four was related to limits on truck traffic for the project. This was the subject. There was a fair amount of testimony and a traffic study was received on that. The way it was written, it stated that the permittee shall limit traffic to no more than twenty five trucks a day with no more than two trucks an hour. Twenty five trucks a day was the original application proposal. In peak hours, truck traffic shall be limited to no more than two trucks an hour, one per hour during the peak hours of the day. Peak hours were from eleven a.m. to six p.m. from the start of the Memorial Day Weekend to the end of Labor Day Weekend. Such peak hour restrictions shall be in place until at least one climbing lane is established on east bound Trout Creek Pass. At such time as the climbing lane is established, the permittee may petition the Board of County Commissioners which will be the authority for the peak hour restriction. Again, he stated that this was developed over time, looking at the public record what was submitted by the applicant and the testimony received. They took a real close look at the coroners analysis provided by Wilkinson, LLC. Essentially in the Wilkinson report, it came down to the percent time following as one of the critical things in determining level of service. There was a graph which identified the level of Service C as the number of hours or as a certain time periods of days. It also showed that the ability for trucks to climb and speed going up those vertical curves as one of the critical elements in creating that lower level of service. Based on that, the condition was written in that manor.

Commissioner Giese commented that he was unsure at first about his second sentence, but now he understood what he was saying. He reiterated everything that County Development Services Director Reimer had just stated. .

County Development Services Director Reimer agreed. He stated that there was a chart in the report that showed the level of Service C between eleven and six throughout the entire month of July and also in limited hours or similar hours in both June and August.

Commissioner Giese stated that basically for seven hours, they were limited to seven trucks.

County Development Services Director Reimer stated that was correct.

County Land Use Counsel Green stated that the emission standards were a representation throughout the process. This was an attempt to capture that. This went to the air quality noise order standards.

Chairman Holman stated that he had an issue with the last part of that stated "and shall utilize the latest emissions control technology" that could mean that they would have to upgrade their trucks monthly and yearly depending on how technology develops. He stated that was way beyond what they needed as long as they were with current standards adopted by federal state and local. He stated that they should be good.

County Land Use Counsel Green stated that there were two thoughts that she was unsure how they developed through the record. She did not trace this one back. One

thought was obviously they had to meet federal, state and local standards. The other was to use best available technology. She stated that those were two separate things. She could meet standards and not be using the state of the art equipment. This came about through testimony during the course of the proceeding.

County Development Services Director Reimer stated that the way it was left on May 21<sup>st</sup> when this was discussed was the language needed to be refined.

Chairman Holman commented that was the only problem he had. He was guessing, hoping and assuming that the trucks would be fairly new. They would be using the latest technology, but in the future this could be a problem. The trucking firm actually gave us some literature and a presentation on their trucks and what they did. If this was related back to that company, the Commissioners were acceptable to that type of equipment.

County Development Services Director Reimer stated that was submitted to the County in the letter from West Coast Express that was identified as exhibit 2 Z that discussed their commitment to run.

County Land Use Counsel stated that it would be easy to tie it to that. The idling had been there all along, which now brought them to the general conditions. There were a couple of conditions that she needed the input from the Board. Number one basically stated that the project was as the applicant had described it and as the applicant had amended it over the course of the proceedings. If an applicant made changes to a project on the record during a public hearing process that was considered to be the project now going forward, whether it was orally or in writing. It also made it clear that this permit was for the project as described in the application as amended both orally and in writing. Therefore, they would have a sense of what would be permitted if the County were to issue a permit. With that idea, if there was any change for example if the truck started going to Utah instead of Denver that would be a change from what had been presented to the Board that the obligations on the permit holder to notify the County of any change. This was something that was in any land use permit; whether explicit or implicit. The permit covered some specific operations, nothing more than that. This imposed an obligation on the permittee to notify the County and had the County determining whether an amendment would be required. The purpose of an amendment was to make sure that the trucks going to Utah would not violate any of the standards and the 1041 permit conditions and whether or not they might have to have new conditions to make that true. It reopens it. The term reopener was what we will use right now even though it was vague. It stated that the permittee shall notify the County and the County shall determine whether an amendment to this permit will be required. She stated that County Davis and she had not had much time to talk about but it seemed like the way that this would probably work, they would notify staff of a change. Then from there she felt that the staff would make a recommendation to the Board as to whether or not it should be reopened. Then the Board would make that determination. It would also allow the Board to take an enforcement action if any material representations were false or deliberately misleading. If an applicant for a nuclear detonation site promised that they would only be using a certain kind of feed and it turned out that was never the case, the Board would be able to shut it down and bring in reinforcement action. The dispute resolution idea erupted or emerged during the discussion of cost to the County. This was another concern presented by many people during public testimony. She stated what if a future company took over or there was a permit holder who was particularly litigious, and every time you turn around, says stop pumping because you violated this commission or tried to do anything here. They immediately want to go to litigation. This was the idea of some kind of alternative dispute resolution process. The applicant proposed arbitration. She was proposing mediation. She stated arbitration was basically like litigation. Only it was not done in the court room. It was done with an arbitrator in a very formal setting. Mediation was much more as you know. You negotiate with hostages in a mediated session. It was more negotiated but you have neutral third party person who has been selected by the



disputing parties. If that did get resolved then it goes to litigation. She asked for the Boards' collective feedback.

Commissioner Glenn stated that his feedback was would mediation be considered litigation in respect to the mitigation fund. They were generally born by both parties. He did not want them born by both parties.

County Land Use Counsel Green asked him to be clearer.

Commissioner Glenn stated that he did not want the County to pay for it.

County Land Use Counsel Green asked County Development Services Director Reimer if he wanted to cover the term of the permit, the ten year term. She did not have very good background on that particular term.

County Development Services Director Reimer believed that it was a result of the initial ten year lease.

County Land Use Counsel Green asked again for the Board's feedback about extending the term of the permit and if that was something they wanted to have the final decision on.

Commissioner Glenn stated that yes it was.

County Land Use Counsel Green stated that number four gave the permittee three years to take substantial steps to begin the project. It also allowed the County, which would be the Board she assumed, to extend the time period. When there was a final resolution, with definitions and everything else, there would be a definition of permit authority, which was the term that through regulations used, cross referenced with County and would indicate when it was staff and when it was the Board of Commissioners. Transfer written consent required was pretty typical. With violation, she stated that it spoke for itself. A general annual reporting requirement that was actually part of the 1041 Regulations required an annual review process. Therefore, this would be in addition to the monthly reporting for the water. This was a separate over arching report that was required by the County's regulations. Number eight, nine, and ten we talked about the need now based on the Board today to fold these together. On the water litigation piece, this was very detailed. She thought that there was a benefit to the water litigation piece being detailed like this. She knew that County Water Counsel Culichia worked a long time on this. Maybe when he was ready, they could talk to him about why it was proposed this way. We probably want to keep this. She continued with number ten. This one was very detailed, unlike some of the other cost reimbursement sections. She felt that it was something that they wanted to keep. When talking about the mitigation fund and have a more general provision on costs, she was wondering if the Board could go through this and discuss why it was so detailed.

County Water Counsel Culichia stated that partly because it was so detailed, it was a suggestion received from Nestle that they comment on, fill in some of the blanks and add some things. The idea of the not-to-exceed budget and number of water counsel legal hours was Nestlé's suggestion. The problem with developing the not-to-exceed budget was that was just an estimate. Any kind of litigation or water court was unknown. Whether there be a not-to-exceed budget was something that Board would need to think about.

County Land Use Counsel Green stated that in the other cost reimbursement ideas, including the mitigation fund, there were not any boundaries other than it had to be reasonable. They would have to pass the reasonable test. This one had bounds but the other ones did not. If she were an applicant seeking a permit, she would want to constrain the Board's discretion as much as possible, as long as the process, the cost and the documentation from the County of any costs were reasonable. However, this

was her opinion. Courts deal with what is reasonable on a regular basis and it is not an unknown term.

County Water Counsel Culichia stated his anticipation would be that Nestlé's concern about this mushrooming into a hundred thousand dollar budget was not going to be that kind of situation. In water court, there were multiple objectors some of who were more active than others. The County's goal in water court would be to make sure that the decrees or anything that gets approved would be consistent with the 1041 Permit and the County's other concerns. If there were parameters as County Land Use Counsel Green had stated, it would be reasonable when related to the permit conditions and things like that. He thought that was probably antiquated. This was what was proposed by Nestle as augmented by some of his language, though it certainly did not need the degree of specifics. He did not think that it was going to mushroom into some huge deal from the County's perspective but maybe from some other opposer.

Commissioner Glenn stated in consistency areas where this was discussed was this the way that they needed to go.

County Land Use Counsel Green stated to make sure that it was abundantly clear that the Board become a final arbitrator short of the court of what was reasonable. What that meant was that the staff and the public or permit holder at any time can come to the Board and say that this was not reasonable. The Board would make that decision. She asked County Development Services Director Reimer if he would like to talk about the Hagen exception.

County Development Services Director Reimer stated very briefly that there was a proposal throughout the application or an amendment to the application to discuss an exception of a sale of approximately fifteen acre parcel to the Hagen's. The parcel was not yet created but was described to be part of the Bighorn Parcel. This condition simply stated that there was no parcel until such time as it went through Chaffee County Subdivision regulations. Then it achieved to the description that was initially provided by Nestle to require an amendment to this permit.

County Land Use Counsel Green continued with number twelve. She stated that it was related but a separate issue to financial security. When they go back and review the whole idea of the mitigation fund, this would be part of that analysis. Currently, the temporary regulations require people to post financial security to guarantee what they are going to build and to comply with conditions. Typically in most counties that relate to construction, the idea of financial security was if they did not construct what they say that they were going to construct. You would go in just like in your subdivision improvement agreements as it was the same concept. The 1041 regulations do not limit it to that. It also talks about, to guarantee compliance with permit conditions. She felt that they were going to have to sort that out. They were going to have to figure out what things upfront they wanted for because they are going to happen versus the more unknown in the mitigation fund. This of course was a letter of credit or something like that as opposed to the mitigation fund which was proposed to be cash funded. She continued with the last one. They were going to be complying with the other permits and they would have to get any other permits required by the County. In closing she felt like they received really good direction today. One of the things that they talked about was making sure that there was one condition that was entitled reopener that explained all these other conditions where failure to satisfy this condition subjects you to review of the permit. She would like to draft a reopener section. It would apply to any of the reopeners making clear to what that process is and the procedure that happens.

Chairman Holman made a motion to close the meeting saying that he was comfortable with that.

County Attorney Davis asked if whether or not the Board needed to revisit the issue of reopening the hearing based on what took place that morning.

Chairman Holman stated that based on the education, they had all received especially regarding the water issues, that he would hope that any concerns that the public had and the applicant could be directed to staff. He did not see a whole lot of value in reopening this.

Commissioner Glenn agreed with Chairman Holman. However he did want to state that while they did get clarification on the water issues and on some economic issues, he still harbored some concerns in those areas. In some time, they might want to reopen that specific area to look at because those were the two biggest issues that he was dealing with. He expressed those concerns in the previous meetings. He would like that to be put on record. They wanted to look at those small specific windows of certain areas.

County Land Use Counsel Green stated that ultimately the Board down the road when it was ready, their decision was to determine A - where all the applicable criteria had been met. If not, deny it or impose conditions. Those conditions, you must determine that they would enable the applicant to comply with criteria. The very first step had the applicant born his burden of proof that all of the standards had been satisfied. Only if the answer to that was no, would you even get into conditions. Then you only get into conditions, if you decide not to deny it.

Chairman Holman asked when they can expect to have the update on these conditions.

After some discussion, they all agreed to have the next meeting in two weeks, Wednesday, August 19<sup>th</sup> at 9 a.m.

Chairman Holman asked what the running timeline now on days from when they closed the public hearing.

County Land Use Counsel Green stated that the permit authority shall act upon a permit application within sixty days after the permit hearings. She continued stating that act was not defined. County Attorney Davis and she both thought that acting on it meant the deliberate phase. The Board had been in that phase and they also have had requests from the applicant to continue. She thought that they were alright. She stated that it was County Attorney Davis' call.

County Attorney Davis thought that the best way to approach this was if the staff believed that they were having a problem, they would let the Board know.

Commissioner Glenn told County Land Use Counsel Green that he was a little concerned when she mentioned that Nestle had indicated that they wanted us to continue this. They had denied that request to continue.

County Land Use Counsel Green stated that she understood, but they needed a waiver from them of any time frames. They would make sure that they get something in writing.

Commissioner Glenn said that he did not want it to get to that critical date and then it was approved by default.

County Land Use Counsel Green stated the way that they had been interpreting it was that act on it meant begin your deliberative process. This was the action that began the previous week. They would find out from the applicant if they saw it differently.

Chairman Holman stated that there was a motion on the table.

Commissioner Glenn seconded the motion. On the question, the motion carried 3 – 0.  
The meeting adjourned at 4:34 p.m.

Attest:



Joyce M. Reno

Chaffee County Clerk

"The Board of County Commissioners (the "Board") acknowledges receipt of the above of the above draft meeting minutes. It is the policy of the Board, adopted at a regular meeting held on October 20, 2009, that the CD taken at the meeting shall constitute the official minutes of the meeting. To the extent that the above textual summary provides an overview of the subject matter discussed and action taken by the Board, the above shall constitute the visual text record of the Board. Any further detail, including summaries of testimony and deliberations, has not been approved by the Board should not be considered minutes of the Board."

Clerk's Note:

Since the Board of County Commissioners (the Board) did not approve the above minutes, they will remain as draft minutes as minutes of record. A CD is available for the official recording of this meeting.